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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TERRANCE MATTHEWS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented by this Petition are:

1. Whether, under Fed.R.Evid. 404(b), the mere fact of a not guilty plea in a prosecution for conspiracy to distribute multiple kilograms of cocaine permits introduction of evidence of an unrelated street-level drug sale years earlier where:

(a) the Rule 404(b) evidence was offered by the Government solely as evidence of intent, and

(b) intent was never disputed by the defendant, whose sole defense was that he had not committed the charged acts at all.

2. Whether the Eleventh Circuit, contrary to the other circuits, correctly precludes review of *Blakely/Booker* error in cases in which the error was not raised on direct appeal until after the decision in *Blakely* but during the pendency of the direct appeal, contrary to the direct appeal retroactivity rule of *Griffith v. Kentucky*.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Terrance Matthews, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on December 6, 2005.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Eleventh Circuit appears at App. 1a-55a of this Petition and is published at 431 F.3d 1296. The Eleventh Circuit's *sua sponte* order vacating its previous order denying the United States' petition for rehearing appears at App. 56a to this Petition and is unpublished. The lower court's order denying the Government's petition for rehearing appears at App. 58a of this Petition and is unpublished. The initial opinion of the court of appeals appears at App. 60a-106a of this Petition and is published at 411 F.3d 1210. The court of appeals' order denying supplemental briefing on the issue of *Blakely/Booker* error appears at App. 107a of this Petition, and its order granting Matthews' renewed motion for supplemental briefing appears at App. 109a; both are unpublished.

JURISDICTION

The court of appeals entered its judgment on December 6, 2005. A copy of the January 24, 2006 order denying a timely petition for rehearing and rehearing *en banc* appears at App. 111a to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND RULE PROVISIONS INVOLVED

This case requires interpretation and application of Fed.R.Evid. 404(b) and the Fifth and Sixth Amendments to the Constitution of the United States. The Fifth Amendment provides, in pertinent part:

> No person shall...be deprived of life, liberty or property, without due process of law....

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....

Rule 404(b) of the Federal Rules of Evidence provides, in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident....

STATEMENT OF THE CASE

A. The Basis for Jurisdiction Below

Terrance Matthews was convicted of conspiracy to distribute more than five kilograms of cocaine in violation of 21 U.S.C. §§846 and 841(a)(1), and witness intimidation in violation of 18 U.S.C. §1512(b)(1) in the United States District Court for the Middle District of Florida. The basis of federal jurisdiction in the district court was under 18 U.S.C. §3231.

B. Facts Material to the Questions Presented

Terrance Matthews was charged in a superseding indictment with conspiracy to distribute cocaine and with two counts of witness intimidation. He entered a plea of not guilty and proceeded to trial. At trial, the Government presented evidence of one of more than 6,300 telephone calls, intercepted during an investigation, in which one alleged coconspirator, Moore, told another, Alston, "that he would call 'sa-ous' because he had 'the number programmed.'" *United States v. Matthews*, 431 F.3d 1296, 1298-99 (11th Cir. 2005) *(Matthews II)*. (At trial, Alston testified that Sa-Ous was a nickname for Matthews). Some ninety minutes later, the Government intercepted a telephone call between Matthews and Alston, and Alston testified at trial that the conversation during that call referred to the price of one kilogram of cocaine, but Alston could not recall whether he actually sold Matthews the referenced kilogram of cocaine. *Id.* at 1299-1300.

The Government presented testimony by Alston, Moore and five other individuals, all of whom had pled guilty pursuant to plea agreements providing for reduced sentences in exchange for their cooperation, and all seven of the testifying witnesses stood to benefit, at the time of trial, from pending motions to reduce their sentences filed pursuant to Fed.R.Crim.P. 35, predicated upon their continued cooperation in the prosecution of Matthews. All had already benefitted, prior to Matthews' trial, by many years in the sentence reductions they had previously received. *Id.* at 1300-05. The alleged coconspirators testified that they were involved in transacting kilograms of cocaine with Matthews between 1999 and 2001. *See id.*

After presenting the testimony of the seven alleged coconspirators, the Government's sole remaining evidence was testimony by two members of the Miami-Dade Police Department who had testified that they arrested Matthews on December 31, 1991. The officers testified that they saw Matthews on three occasions take a small package out of the trunk of a car, hand it to another person and receive something in exchange for it. After arresting Matthews and the recipient of the third package, the officers found that the third package contained cocaine, and they found 251 grams of cocaine and some marijuana, all packaged for street sale, as well as about $3,500.00 and three guns. They testified that Matthews told them at the time that he was near the bottom of the hierarchy of street sales of drugs. *Id.* at 1305-06.

The testimony of the police officers was admitted, over Matthews' pretrial motions in limine and trial objections, pursuant to Fed.R.Evid. 404(b). The Government was allowed to introduce the police officers' testimony under Rule 404(b) as proof of Matthews' intent, and the Government argued to the jury that the evidence showed that Matthews had the same intent at the time of the charged conspiracy as he had at the time of the 1991 arrest. 431 F.3d at 1306. Matthews argued that the Government utilized the officers' testimony "precisely because it recognized the dubious credibility of the witnesses on which its case rested." *Id.* Matthews was convicted by the jury of all three charges.

On appeal, a panel of the Eleventh Circuit unanimously reversed Matthews' convictions on all three counts, holding that the evidence of Matthews' 1991 arrest

was not admissible to prove his intent in regard to the charged conspiracy, and that the error in admitting the evidence was not harmless. *United States v. Matthews*, 411 F.3d 1210, 1212, 1224-30 (11th Cir. 2005) *(Matthews I), vacated*, 431 F.3d 1296 (11th Cir. 2005). The Eleventh Circuit concluded that Matthews' defense clearly contended that the alleged coconspirators were lying about him having been involved in their drug trade at all, not that he had been involved with them but lacked the intent to involve himself in the charged conspiracy. *Matthews I*, 411 F.3d at 1225. As the court stated the issue,

> We cannot see how a juror would have found the witnesses credible to the extent that they described buying large quantities of cocaine from Matthews on numerous occasions over a period of more than two years and yet doubted that Matthews did, in fact, intend to involve himself in conspiracy to distribute cocaine. The suggestion is preposterous.

Id. The Eleventh Circuit panel rejected the Government's contention that such Rule 404(b) evidence is admissible to prove intent in a conspiracy case whenever a defendant pleads not guilty. "This cannot be the law, and we take this opportunity to hold emphatically that it is not the law." *Id.* at 1226.

The Government's petition for rehearing was denied below on August 10, 2005. *See* App. 58a. However, the Court did not issue its mandate.

Then, on December 6, 2005, the Court of Appeals entered an order *sua sponte* vacating its previous denial of the Government's petition for rehearing, together with an opinion granting the petition for rehearing, vacating its previous opinion in the case and substituting an opinion that affirmed Matthews' conviction. App. 56a; *Matthews II*, 431 F.3d at 1298. On the Rule 404(b) issue, the same panel that had unanimously reversed Matthews' convictions six months earlier concluded that circuit precedent compelled affirmance of Matthews' convictions because intent is always at issue when a defendant pleads not guilty to a conspiracy charge in the absence of "affirmative removal" by the defense of intent as an issue. *Id.* at 1311. Judge Tjoflat specially concurred, finding the affirmance a "correct application of this circuit's precedent," but expressing "that the circuit's doctrine with respect to admission of Rule 404(b) evidence in conspiracy cases has evolved into one that undermines Rule 404(b) itself and represents a perversion of the origins of the circuit's doctrine in this context." *Id.* at 1313.

Additionally, after briefing, this Court rendered its decision in *Blakely v. Washington*, 542 U.S. 296 (2004), but the court of appeals at that time denied Matthews' motion for supplemental briefing on that sentencing issue, even though he had specifically contested the issue of drug quantity at sentencing for purposes of calculating his sentence under the United States Sentencing Guidelines. *See* App. 107a. Subsequently, following oral argument, this Court decided *Booker v. United States*, 543 U.S. 220 (2005), and the court of appeals then granted Matthews' motion for supplemental briefing on that issue. *See* App. 109a. In both opinions of the court, the court overlooked that it had

granted supplemental briefing on the *Blakely/Booker* issue, but found the issue barred by circuit precedent. *Matthews I*, 411 F.3d at 1211 n.1; *Matthews II*, 431 F.3d at 1298 n.1.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Court should grant certiorari because the Eleventh Circuit's application of Fed.R.Evid. 404(b) in conspiracy cases, permitting admission of Rule 404(b) evidence to prove intent whenever a defendant has entered a plea of not guilty "has turned Rule 404(b) on its head" into a rule of admission of propensity evidence, *Matthews II*, 431 F.3d at 1319 (Tjoflat, J., concurring), and conflicts with the applicable holdings of other circuits, *id.* at 1318 (Tjoflat, J., concurring, *citing, United States v. Zelinka*, 862 F.2d 92, 99 (6th Cir. 1988). On this question, the Eleventh Circuit's doctrine conflicts with the application of Rule 404(b) in at least three other circuits. *See, e.g., United States v. Ortiz*, 857 F.2d 900, 904 (2nd Cir. 1988); *Zelinka*, 862 F.2d at 99; *United States v. Schaffner*, 771 F.2d 149, 153-54 (6th Cir. 1985); *United States v. Sumner*, 119 F.3d 658, 660-61 & n.2 (8th Cir. 1997). The use of Rule 404(b) evidence impacts innumerable conspiracy trials throughout the nation, and the Court should resolve this important conflict. Furthermore, the Court should grant review because of the Eleventh Circuit's abject refusal, contrary to that of all other circuits, to consider *Blakely/Booker* sentencing error issues raised during the pendency of appeal in prompt response to the decision in *Blakely*, but after the submission of initial briefs that failed to raise claims related to *Apprendi v. New Jersey*, 430 U.S. 466 (2000). Accordingly, the Court should grant certiorari on the questions presented in this petition.

I. Rule 404(b)

The Eleventh Circuit's interpretation of Rule 404(b) has perverted the rule into one of automatic admissibility of uncharged bad acts evidence to prove intent in all conspiracy cases in which a defendant has entered a plea of not guilty. The doctrine conflicts with the application of the rule in at least three other circuits. The error of the court below is amply demonstrated by that court's initial unanimous opinion in this case, reversing Matthews' convictions because of erroneous and harmful admission of the other-crime evidence at Matthews' trial, in which Matthews' intent clearly was not placed in issue because the sole and unequivocal defense was that the alleged coconspirators were lying when they testified that Matthews was involved in their drug dealings at all.

As the former Fifth Circuit held, the first step of a Rule 404(b) analysis is a determination of whether the "extrinsic offense evidence is relevant to an issue other than the defendant's character," a test that is satisfied *if* "the extrinsic offense requires the same intent as the charged offense." *United States v. Beechum*, 582 F.2d 898, 911, 913 (5th Cir. 1978) *(en banc)*.[1] Also inherent in consideration of proposed Rule 404(b) evidence is whether the evidence possesses probative value not substantially outweighed by unfair prejudice as well as the other admissibility

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[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) *(en banc)*, the Court below held that it was bound by prior precedent of Fifth Circuit decisions rendered prior to October 1, 1981, when the circuit divided into the current Fifth and Eleventh Circuits.

requirements of Fed.R.Evid. 403. *See Beechum*, 582 F.2d at 911. Of central importance in this case:

> If the defendant's intent is not contested, then the incremental probative value of the extrinsic evidence is inconsequential when compared to its prejudice; therefore, in this circumstance the evidence is uniformly excluded.

Id. at 914.

The Fifth Circuit subsequently concluded that a not guilty plea places the defendant's intent at issue in every conspiracy case, rendering extrinsic offense evidence probative of intent admissible unless the defendant affirmatively removes the issue from the case. *United States v. Roberts*, 619 F.2d 379, 383 (5th Cir. 1980), *citing*, *United States v. Williams*, 577 F.2d 188 (1978). While the Eleventh Circuit, in Matthews' appeal and others, has relied upon the statement in *Roberts* as a holding, it is no more than *dicta* and also is at variance with the actual state of the law in the Second Circuit, upon which *Roberts* relied.

Roberts specifically noted that the Government could be forced to present evidence of intent independent from evidence of the charged conspiracy "[i]f the evidence linking a defendant to a conspiracy is subject to an innocent interpretation." *Id.* *Roberts* further recognized that the nature of the defense may be clearly indicated and remove intent as an issue even before the Government rests. *Id.* at 382 n.1. Furthermore, the defendant's contention in *Roberts* at trial was that he was an employee of the conspirators

with no independent interest in the gambling conspiracy charged, squarely placing intent as the ultimate issue. *Id.* at 383. Further, *Roberts* recognized that district courts must consider "the extent to which the defendant's unlawful intent is established by other evidence" at the time the Rule 404(b) evidence is offered. *Id., quoting, United States v. McMahon,* 592 F.2d 871 (5th Cir. 1979).

Finally, the relevance of the Rule 404(b) evidence in *Roberts* was unquestionable because *Roberts* was a trial for gambling conspiracy, and the Rule 404(b) evidence was of his having participated in a gambling conspiracy four years earlier. *Id.* at 383-84. Accordingly, the court below has extended *Roberts* far beyond its actual holding to allow any evidence of prior drug use or other involvement in a subsequent prosecution for an unrelated drug conspiracy. *See Matthews II,* 431 F.3d at 1311 (citations omitted); *id.* at 1314-20 (Tjoflat, J., concurring) (citations omitted).

The Eleventh Circuit's Rule 404(b) doctrine conflicts sharply with that in other circuits. "[I]ntent is not placed in issue by a defense that the defendant did not do the charged act at all.... When a defendant unequivocally relies on such a defense, evidence of other acts is not admissible for the purpose of proving intent." *United States v. Ortiz,* 857 F.2d 900, 904 (2nd Cir. 1988) (citations omitted).

Similarly, in *United States v. Zelinka,* 862 F.2d 92 (6th Cir. 1988), the court found that the trial record in that case established that the defense offered was not whether the defendant had been a user or distributor of drugs, but whether he was a member of the charged conspiracy and so the court reversed the conviction because of improper Rule

404(b) evidence that he had distributed drugs at a time different than that involved in the charged conspiracy.

> Even if the evidence indicated that Zelinka possessed cocaine for the purpose of distribution in 1986, it was not admissible to prove that he had participated in a conspiracy to distribute cocaine that ended in July 1985. The evidence related to a time that was remote from the period of the conspiracy and involved none of the other conspirators....
>
> This evidence failed the "threshold inquiry" - - it was not "probative of a material issue other than character." On the other hand, it strongly suggested that as one handling an illegal drug at the time of his arrest, Zelinka had probably acted in conformity with the character of a drug dealer 17 months earlier. This is precisely the use for which such evidence may not be admitted under Rule 404(b).

Id. at 99, *quoting, Huddleston v. United States,* 485 U.S. 681, 686 (1988). In *United States v. Schaffner,* 771 F.2d 149 (6th Cir. 1985), the court found that intent is not at issue when "intent is inferable if the proscribed act is proven if defendant does not claim mistake or inadvertence." *Id.* at 153. Further, "where intent is a formal element of the government's case, but criminal intent can properly be inferred from the commission of the act itself, Rule 404(b)'s intent exception may not justify admission of the prior act

evidence." *Id., citing, United States v. Johnson*, 697 F.2d 735, 738-39 (6th Cir. 1983) and *United States v. Ring*, 513 F.2d 1001, 1009 (6th Cir. 1975).

The Eighth Circuit also has held that even where intent is an element of the charge, that element is not placed at issue "when the defendant specifically denies only the criminal act." *United States v. Sumner*, 119 F.3d 660 (8th Cir. 1997). A defendant need not specifically stipulate to the intent element in order to remove the issue from dispute, but may eliminate any dispute "by carefully limiting his defense so as to introduce no evidence nor make any arguments regarding mental state." *Id.* (citations omitted). Where a defense is not merely a general denial "but rather a specific denial that the alleged acts...ever occurred," and particularly where intent could not be seriously disputed if the jury believed that the defendant actually committed the charged conduct, intent is not placed at issue to open the door to the Government's introduction of Rule 404(b) evidence. *Id.* at 660-61 and n.2.

The above cases illustrate why the Eleventh Circuit's "doctrine has turned Rule 404(b) on its head, insofar as conspiracy cases are concerned." *Matthews II*, 431 F.3d at 1319 (Tjoflat, J., concurring). Even where the holdings of some other cases arose in prosecutions for substantive crimes, rather than conspiracy, "[t]here is nothing in the Rule or in logic that would treat conspiracies differently in this regard." *Id.* (Tjoflat, J., concurring). As with the above-referenced decisions from the other circuits, there is no question in this case that if the jury were to believe the alleged co-conspirators' testimony, it must

believe that Matthews intended to possess and deliver cocaine.

> Moreover, Matthews did not put his intent to distribute at issue merely by pleading not guilty. He did not contend that he engaged in the alleged activities but did not know he was distributing cocaine. He did not contend that he was merely present at the alleged transactions. Rather, Matthews claimed that the witnesses were not telling the truth at all.

Id. (Tjoflat, J., concurring).

The panel below found it "impossible for us to imagine a scenario under which the jury could have found that Matthews committed any of the acts described by his accusers and yet lacked the requisite guilty intent." *Matthews I*, 411 F.3d at 1224, *vacated*, 431 F.3d 1296. After Government witnesses testified that Matthews participated in numerous deals ranging from a single kilogram of cocaine to as much as 20 kilograms, "[s]uch conduct is not open to an innocent explanation.... By the time the Government put on its 404(b) evidence, it should have been clear that the Government's case would rise or fall based on whether the jury believed Matthews had committed the charged acts at all, not on whether he possessed the requisite guilty intent." 411 F.3d at 1225. "In the instant case, there is no way that a jury could have doubted that Terrance Matthews knowingly and willfully entered into a conspiracy to distribute cocaine if it found beyond a reasonable doubt that he did what his alleged co-

conspirators said he did," and so the Rule 404(b) evidence in this case served no purpose other than to prove propensity, which is specifically prohibited by Rule 404(b). *Id.* at 1228.

Innumerable conspiracy cases are prosecuted each year with the Government utilizing evidence of unrelated prior substantive offenses under Rule 404(b) in order to prove defendants' intent. The issue is one of substantial national importance which recurs with great frequency throughout the United States. The Eleventh Circuit's doctrine on this issue is wrong and conflicts with that of at least three other circuits, and the Court has not construed or clarified Rule 404(b) since it decided *Huddleston* in 1988. Accordingly, for all of these reasons, the Court should grant certiorari to review the Eleventh Circuit's judgment in this case.

II. *Blakely/Booker*

The Court also should grant the Petition because the court below has held erroneously, and alone among the circuits, in this case and many others, that the failure to raise a *Blakely* argument in an initial brief filed prior to this Court's decision in *Blakely* waives the issue on direct appeal. The other circuits have resolved the same issue by reviewing the merits of such arguments on supplemental briefing or motions for rehearing, and granting relief or simply remanding for resentencing. The resulting circuit split has created real inequity in sentences between defendants within the Eleventh Circuit and those whose cases arose elsewhere in the nation.

The Court should resolve this important division among the circuits. The Eleventh Circuit's pre-*Blakely* decisions conclusively foreclosed *Apprendi* arguments in federal sentencing cases. *Blakely* held, for the first time, that the "maximum sentence" for *Apprendi* purposes is the maximum to which a defendant could be sentenced under the guidelines without resorting to facts beyond those found by a jury beyond a reasonable doubt or admitted by the defendant. The court of appeals refused supplemental briefing in this case in the wake of *Blakely*. App. 107a. Following *Blakely*, the Court held that *Apprendi* and *Blakely* apply to the United States Sentencing Guidelines and that the holding applies "to all cases pending on direct review." *Booker v. United States*, 543 U.S. 220, 268, *citing*, *Griffith v. Kentucky*, 579 U.S. 314 (1987). After *Booker*, the court of appeals granted Petitioner's motion for supplemental briefing, App. 109a. The court's initial opinion failed to note its allowance of supplemental briefing but found the issue moot in light of its reversal of Matthews' convictions. *Matthews I*, 411 F.3d at 1211 n.1. Its subsequent affirmance of the convictions similarly overlooked that supplemental briefing had been granted. *Matthews II*, 431 F.3d at 1298 n.1.

In refusing to consider the issue, the court of appeals relied upon its prior decisions holding that Fed.R.App.P. 28(a)(5) and (j) require that any issues not specifically raised in an initial brief be deemed waived, notwithstanding *Griffith*, contrary to decisions of all other circuits to have reached the issue following *Apprendi* and *Blakely*. *See United States v. Levy*, 391 F.3d 1327, 1345 & nn. 15, 16 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of rehearing en banc), *cert. granted*, 543 U.S. ___, 125 S.Ct. 2542, *reaffirmed*, 416 F.3d 1273 (11th Cir.), *cert. den.*, ___ U.S. ___,

126 S.Ct. 643 (2005). The Eleventh Circuit conflicts with other circuits on this important issue, elevates Rule 28 above the constitutional dimension of *Griffith*, transforms issue forfeiture into waiver and compels counsel in the circuit to brief "any claim that passes the laugh test" even if directly foreclosed by existing precedent. *Levy*, 391 F.3d at 1342-43, 1345 & n.16, 1348 (Tjoflat, J., dissenting from denial of rehearing en banc) (identifying, *inter alia*, circuit decisions conflicting with Eleventh Circuit holdings on these points).

The Fifth, Sixth and Seventh circuits conflict with the Eleventh Circuit's waiver holding on *Apprendi* and *Blakely* arguments in cases briefed prior to those decisions. *See United States v. Rogers*, 118 F.3d 466, 471 (6th Cir. 1997); *United States v. Miranda*, 248 F.3d 434, 444 (5th Cir. 2001); *United States v. Pree*, 384 F.3d 378, 396 (7th Cir. 2004). The Eleventh Circuit also conflicts with circuits that review for plain error *Blakely* issues raised for the first time by supplemental briefs. *Compare, e.g., United States v. Hembree*, 381 F.3d 1109, 1110 (11th Cir. 2004) (denying supplemental briefing on *Blakely*), *cert. granted*, ___ U.S. ___, 125 S.Ct. 2904 (2005), *cert. den.*, ___ U.S. ___, ___ S.Ct. ___, 2006 W.L. 247412 (2006), *with United States v. Oliver*, 397 F.3d 369 (6th Cir. 2005); *United States v. Glenn*, 389 F.3d 283, 287 (1st Cir. 2004); *United States v. Satterfield*, 114 F.3d Appx. 545, 2004 W.L. 2491574, at *1 (4th Cir. 2004) (unpublished); *United States v. Henningsen*, 387 F.3d 585, 591 (7th Cir. 2004); *United States v. Griffith*, 385 F.3d 124, 127 (2nd Cir. 2004); *United States v. Bodilla*, 383 F.3d 1137, 1142 n.2 (10th Cir. 2004); *United States v. Ameline*, 376 F.3d 967, 974 (9th Cir. 2004). The Eighth Circuit, even in response to a *pro se* supplemental brief raising *Blakely*, has remanded cases for resentencing

consistent with *Booker*. *See United States v. Coffey*, 395 F.3d 856, (8th Cir. 2005); *United States v. Burgess*, 2005 W.L. 124523 (8th Cir. 2005) (unpublished).

Seven circuits have explicitly held, contrary to the Eleventh Circuit, that the *Griffith* rule of retroactivity prevails over the prudential doctrine that issues not raised in an initial brief are deemed abandoned. *United States v. Vazquez-Rivera*, 407 F.3d 476, 487 (1st Cir. 2005); *United States v. Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005); *United States v. Hill*, 2005 W.L. 3478099, *1, n.1 (4th Cir. 2005) (unpublished); *United States v. Garcia*, 242 F.3d 593, 599 & n.5 (5th Cir. 2001); *Oliver*, 397 F.3d at 377; *Henningsen*, 387 F.3d at 591; *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) *(en banc); United States v. Byers*, 740 F.2d 1104, 1115-16 n.11 (D.C. Cir. 1984) (Scalia, J., writing for plurality) (where decision, rendered during pendency of petition for rehearing, changed claim "from completely untenable to plausible," court bound to consider and apply change in law even if claim not raised until petition for rehearing). Despite the overwhelmingly contrary results in the other circuits, the Eleventh Circuit has refused steadfastly to reconsider its view, even on remand from this Court. *See, e.g., United States v. Dockery*, 401 F.3d 1261, 1262 (11th Cir. 2005).

The Eleventh Circuit "is truly a minority of one on this issue." *Levy*, 391 F.3d at 1347 (Tjoflat, J., dissenting from denial of rehearing en banc). The Court should correct the Eleventh Circuit minority of one on this important issue.

As a result, federal criminal defendants whose cases were brought within the geographical bounds of the Eleventh Circuit are serving longer sentences than similarly situated defendants in the rest of the United States. The Court should grant review in this case to resolve this inequity of national importance. *See Johnson v. United States*, 520 U.S. 461, 556 n.16 (1997) (decrying "the actual inequity" resulting from disparate application of new rule among similarly situated defendants); *Griffith*, 479 U.S. at 327 (same).

In this case, Petitioner contested drug quantity at sentencing and raised his *Blakely* issue promptly after *Blakely* was decided, by way of seeking supplemental briefing and rehearing. The court of appeals refused to consider the issue on supplemental briefing, rehearing or remand from this Court in this case and many others, contrary to all the other circuits. The Eleventh Circuit is wrong on the issue and conflicts directly with its sister circuits. Accordingly, the Court should grant certiorari.

* * * *

The issues raised in this Petition are ones of substantial and recurring importance in federal law. The court of appeals has reached the wrong conclusion on both issues, conflicting with the other circuits. Accordingly, the Court should review the Eleventh Circuit's judgment in this case.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Date: April 24, 2006

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TERRANCE MATTHEWS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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[PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
December 6, 2005
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-15528
Non-Argument Calendar

D.C. Docket No. 02-00109-CR-J-20-TEM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRANCE MATTHEWS,
a.k.a. Jack,
a.k.a. Say Jack,

Defendant-Appellant.

Appeal form the United States District Court
for the Middle District of Florida

(December 6, 2005)

ON PETITION FOR REHEARING

Before TJOFLAT and HILL, Circuit Judges, and GRANADE*, Chief District Judge.

PER CURIAM:

The United States's Petition for Rehearing is GRANTED. The opinion issued on June 8, 2005, in United States v. Matthews, 411 F.3d 1210, is VACATED, and we substitute the following as the opinion of the court:

Following a jury trial in the United States District Court for the Middle District of Florida, Terrance Matthews was convicted of one count of conspiracy to distribute five or more kilograms of cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1) and two counts of obstruction of justice by

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*Honorable Callie V. Granade, Chief United States District Judge for the Southern District of Alabama sitting by designation.

intimidation of a witness in violation of 18 U.S.C. §1512(b)(1). The district court sentenced Matthews to 292 months of imprisonment and ten years of supervised release on the conspiracy count and imposed concurrent sentences of ten years of imprisonment and three years of supervised release on each of the witness intimidation counts. On appeal, Matthews raises four issues:[1] (1) whether wiretap evidence should have been excluded because the recordings were not sealed in compliance with 18 U.S.C. §2518(8)(a); (2) whether evidence of a telephone conversation not involving Matthews should have been excluded because it was hearsay, irrelevant, and unfairly prejudicial; (3) whether there is sufficient evidence to sustain the witness intimidation convictions and a related sentencing enhancement; and (4) whether the district court

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[1] Matthews belatedly sought to challenge the constitutionality of his sentence in light of Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L. Ed. 2d 403 (2004). Briefing in this case was completed before Blakely was decided, but a little more than four months before oral argument Matthews sought permission to file a supplemental brief challenging the constitutionality of his guideline sentence in light of Blakely. That motion was denied, as required by circuit precedent. See, e.g., United States v. Curtis, 380 F.3d 1308 (11th Cir. 2004) (holding that we will not permit supplemental briefs raising Blakely claims that were not advanced in defendants' pre-Blakely initial briefs notwithstanding the fact that such claims were squarely foreclosed by circuit precedent prior to Blakely). But see United States v. Levy, 391 F.3d 1327, 1345-1347 & nn.15-17 (11th Cir. 2004) (Tjoflat, J., dissenting from the denial of rehearing en banc) (explaining that "this court is truly a minority of one on this issue" and collecting cases).

erred by admitting evidence of Matthews's 1991 arrest under Federal Rule of Evidence 404(b).

Part I recounts the course of the proceedings in the district court. In Parts II-V we address Matthews's four claims and find that the district court committed no reversible error. Part VI briefly concludes.

I.

At trial, the Government presented evidence that Matthews was part of a significant, though somewhat informal and irregular, conspiracy to distribute cocaine in Jacksonville and Miami. DEA Agent Frank Orochena testified that the DEA began investigating the conspiracy in July 2000 when Nathaniel King, also known as "Peewee," offered to cooperate with them. Peewee was involved in the conspiracy as a courier. His job was to take cash from Jacksonville to Miami and then return to Jacksonville with cocaine for distribution there. Peewee's employer was Linwood Smith, a major participant in the Jacksonville end of the conspiracy.

In August of 2000, Peewee and an undercover agent bought five kilograms of cocaine in Miami with cash provided by Linwood Smith. On the return trip to Jacksonville, the DEA seized the cocaine in a staged stop. Peewee was allowed to "escape" so that the investigation would not be compromised. The DEA was then able to obtain authorization for wiretaps on Linwood Smith's cell phone and two cell phones owned by Farrell Alston, a major supplier in Miami. Smith's phone was monitored for sixty days. During this time more than 6300 calls were

intercepted, 319 of which were deemed "pertinent," i.e., related to the conspiracy. Matthews was not involved or mentioned in any of the pertinent conversations. Alston's phones were monitored for thirty days, and more than 2400 calls were intercepted, 106 of which were deemed pertinent. One of the intercepted conversations was between Matthews and Alston; Alston testified that he and Matthews were discussing the sale of a kilogram of cocaine during the call. Matthews's name was also mentioned briefly in a conversation between Alston and Jason Moore, another member of the conspiracy. The DEA intercepted the Moore-Alston conversation at 5:21 P.M. on March 20, 2001. Near the end of the short call Moore told Alston that he would call "sa-ous" because he had "the number programmed." Alston testified that "sa-ous" was one of Matthews's nicknames; thus, Moore was going to call Matthews because he had Matthews's phone number programmed on his phone. Moore also told Alston that he would "be on your end 'bout Thursday, Friday" and would "need power pellets." According to Alston, "power pellets" are ecstasy pills. Alston told Moore that he would "get that set up for [him] then."

An hour-and-a-half later, the Government intercepted the Matthews-Alston call. During their conversation, Matthews asked Alston whether "J" (Jason Moore) had called him. Alston said that he had. Matthews then asked whether Alston had "put [Moore] on . . . twenty-six street." Alston testified that "twenty-six street" was a code for the price of a kilogram of cocaine; thus, Matthews was really asking whether Alston had quoted Moore a price of $26,000 for a kilogram of cocaine. Alston replied, "[H]ell no I wouldn't give that to him for that." Matthews said,

"Good. Just give it to me then." In other words, according to Alston, Matthews wanted Alston to give him the kilogram so that he could then sell it to Jason Moore.[2] At trial, Alston could not recall whether he actually sold Matthews this particular kilogram of cocaine.

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[2] The conversation went as follows:
MATTHEWS: "J" call you? ....
ALSTON: Who this, Jack?
MATTHEWS: Yeah.
ALSTON: Yeah, he had call me.
MATTHEWS: Oh, you told 'em something?
ALSTON: What, a number?
MATTHEWS: Yeah
ALSTON: No, no, he ain't, ah, he ain't, ah he ain't ask me nothing 'bout that.
MATTHEWS: Ah, when he ask you a number put him on, ah twenty-six street....
ALSTON: Who gone, who gone, who ah, oh who gone do that?
MATTHEWS: Ah, you said on twenty-six street.
ALSTON: Shit, I a hell no wouldn't give that to him for that.
MATTHEWS: Good. Just give it to me then.
ALSTON: Alright. I wouldn't give that to him for that somebody down with me, dawg.
MATTHEWS: So go more than that?
ALSTON: You goddamn right.
MATTHEWS: Where he at, twenty what?
ALSTON: For him?
MATTHEWS: Seven?
ALSTON: No less.
MATTHEWS: Oh, okay, yeah, alright then.
ALSTON: On where, where you at, L's house?
MATTHEWS: Yes, L's house.
ALSTON: I'm getting off at the one-o-three right now.
MATTHEWS: Come by here.
ALSTON: Alright.
One of Matthews's nicknames is "Say Jack" or "Jack."

In July and October 2001, the DEA arrested a number of members of the conspiracy. Among them were Farrell Alston, Anthony Wells, Shawn Richardson, James Brown, Antonio Austin, Jason Moore, and Rodney Cannon, all of whom eventually pled guilty and, pursuant to their plea agreements, cooperated with the Government and testified against Matthews. Farrell Alston was the first of the conspirators to testify at trial. Alston testified to having sold more than 400 kilograms of cocaine during the course of the conspiracy. As part of Alston's plea agreement, the Government filed a §5K1.1 motion[3] on his behalf, which led to a five-level sentence reduction for substantial assistance.[4] Alston also received a three-level reduction for acceptance of responsibility. As part of the plea, the Government also declined to pursue any sentencing enhancements based on a firearm found on Alston at the time of his arrest. Alston was sentenced to 135 months in prison for his role in the conspiracy. Without the aforementioned reductions, his applicable guideline range was 324 to 405 months—235 to 293 months even taking into account the reduction for acceptance of responsibility. The Government also filed a

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[3] "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." U.S.S.G. § 5k1.1

[4] Throughout the opinion, we speak of various sentencing reductions, by which we mean reductions from the "base offense level" under the Federal Sentencing Guidelines for the offense to which the defendant pled guilty.

Rule 35[5] motion on his behalf that was pending at the time of Matthews's trial; Alston was hopeful that it would result in a further reduction of his sentence.

At trial, Alston testified to the following facts regarding the conspiracy: Alston and James Brown were partners in Miami, and Alston was introduced to Matthews through Brown. Alston was responsible for getting cocaine, and Brown had connections with buyers in Jacksonville, including Antonio Austin, Jason Moore, and Linwood Smith. At first, Alston and Brown used Peewee as a courier. Peewee would bring cash to Miami, and they would send twenty to forty kilograms of cocaine at a time back to Jacksonville. After Pewee "escaped" from the staged DEA stop, however, the Jacksonville customers began traveling to Miami to purchase the cocaine in person. Alston's main supplier was George Morales, but he also bought cocaine from Matthews a few times when Morales didn't have all that he needed. Specifically, he purchased cocaine from Matthews – usually five to ten kilograms, but once as much as twenty, at a price of $18,000 to $23,000 per

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[5] Federal Rule of Criminal Procedure 35(b)(1) provides that "[u]pon the government's motion made within one year of sentencing, the court may reduce a sentence if: (A) the defendant, after sentencing, provided substantial assistance in investing or prosecuting another person; and (B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements." All of the testifying co-conspirators faced ten-year statutory mandatory minimums. Rule 35(b)(4), however, provides that "[w]hen acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

kilogram—"no more than about five or ten times" in 1999 and 2000. He also sold Matthews one to three kilograms of cocaine on about five different occasions in 2000. He and Brown ceased doing business with Matthews, however, after he sold them some bad cocaine sometime in 2000.

After Alston was sentenced and incarcerated in federal prison in Miami, Matthews sent him four letters. The letters used pseudonyms, but Matthews stipulated that he wrote them, and Alston knew that they were from Matthews. The first letter began, "I been hearing some bad things about you old boy and it's coming from some people that seems to know you well." It continued, "[T]he talk is that you have went bad for those folks and you are lying on anyone to get time cut . . . . [T]here is anuff brothers in there for nothing on the count of another brother telling a lie on them." Matthews also urged Alston not to "be another sucker for those folks." Alston understood this to mean that Matthews knew that he was cooperating with the Government and wanted him to stop. The letter also encouraged Alston "to seek the lord and pray and read that bible every day and ask him to show you a way to get closer to him so you could be a better man in christ"; Alston testified that he and Matthews had never discussed religion before.

The letter next stated:

> I know you heard about sleep got killed[;] he got shot up in the car one night[;] he died in the hospital a month later[;] thats why I say get your self right with the lord because we don't know when were leaving here but we won't to be right with Jesus.

"Sleep," also known as "Blind," owned a house in Miami where Matthews, Alston, and other members of the conspiracy met to drink, smoke marijuana, shoot dice, and hold dogfights. Alston understood Matthews to be advising him that he should get himself "right" with God because "you don't know when you're going to die." At this point, the Assistant United States Attorney (AUSA) followed up by asking, "And how did you take that? What did you understand that to mean?" Alston explained, "I was taking it, you know, that I'm cooperating with the government, so [Matthews] might have been making threatening gestures." At the end of the letter, Matthews urged Alston not to "be a 'Judus.'"

In the second letter, Matthews again wrote that "sleep got shot up about four times" and urged Alston to keep praying and reading the Bible. He also wrote:

> I know you all ready know the talk on the streets is that you are putting [Matthews] in the mix[.] [W]hats up with that man[?] We all know that [Matthews] didn't have anything to do with you'll other than gambleing and fighting dogs man[.] I don't know but that's crazy too how that kid got indicted on that case with you all. Your son[6] say that you aint saying nothing on no one, but why is it so hard for you to help that man get out of this by just

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[6] Alston's "son" was really a friend of Alston's known as "Tit."

telling the truth to his attorney[?]

Alston understood Matthews to be asking him why he would not tell the Government that Matthews was not part of the cocaine conspiracy, since they both knew that to be the "truth." The letter then stated, "[I]f it was any one of us on the one you know it won't be a problem helping you if they put you in something over there that you had no business with." Matthews apparently meant that the people who hung out at Blind's house ("the one") would all be willing to help Alston if he were ever implicated in a crime he "had no business with."

In the third letter, Matthews wrote,

> [Y]ou don't have your self together with God on believing in Jesus Christ his son because if you did you will be trying to do the right thing and help a brother out . . . [Y]ou say you aint doing nothing to no one[,] but I don't need silence from you[.] I need . . . a true friend to help me out because you know it aint . . . like they are trying to put it. . . . I'm asking you for your consideration because you know the truth.

Alston understood this to be yet another request that he tell the Government that Matthews was not involved in the cocaine conspiracy, i.e., the "truth." At the end of the letter, Matthews added, "P.S. Sleep Died too!" and "Say Ough Love You!" "Say Ough" is one of Matthews's nicknames.

In the fourth letter, Matthews wrote, "I know you heard about old boy[;] that junk was mess up." Alston understood this to be yet another reference to Sleep's murder. He then wrote,

> [T]hese folks is trying to lock say ough up[.] [W]hat's up with you[?] [A]re you doing what they say you are doing[?] . . . [Say ough] say he been trying to get in touch with you but you won't write back or nothing or talk to his lawyer[.] [H]e say the reason he in this mess is calling your phone and the folk think you'll are talking about something[.] [M]an you know that man didn't have anything to do with you all so way you not going to help that man out of these mess[.] [T]hat man sick[;] he don't know what to do[.] [Y]ou say you not telling nothing on him but you still not trying to help him by telling the truth[.] [H]ow will you feel if you got pick up for something on seven one[7] and you know you don't do nothing but gamble round there but the folks say you do something else and no one on seven one is trying to help you[?] . . . [I]t seems like I'm losing everyone I love from niggers lying on them[;] you know that's way sleep got shot up because a nigger step to him and said he was telling the folks on him and they

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[7] Blind's/Sleep's house was also known as the "seven one" because it was on 71st Street.

had a fight and that same night he got shot up on the house . . . .

Alston interpreted this passage as yet another request that he cease cooperating and tell the Government that Matthews had nothing to do with the conspiracy. He understood the final quoted sentence to mean that Sleep had been killed because someone thought that he was cooperating with the Government. After Alston finished going through all four letters line-by-line, the AUSA asked him what, in general, he understood the letters to be conveying to him. Alston answered, "Like when he found out that I was cooperating, he made me some threatening gestures."

James Brown testified next. Brown testified that he had sold "hundreds" of kilograms of cocaine during the course of the conspiracy. He pled guilty to conspiring to distribute between fifteen and fifty kilograms. After the Government filed a § 5K1.1 motion on his behalf, Brown received a sentencing reduction for substantial assistance, and he was sentenced to 168 months in prison. Without the § 5K1.1 motion, he was facing 262 to 327 months based on his substantial criminal history. The Government also filed a Rule 35 motion on his behalf that was pending at the time of Matthews's trial; Brown was hopeful that it would result in a further reduction of his sentence.

Brown's general description of his partnership with Alston was consistent with Alston's testimony. According to Brown, he and Alston purchased ten or more kilograms of cocaine from Matthews "three or four times at the most" in 1998 and 1999. He also bought smaller quantities of

cocaine from Matthews on two other occasions. The cocaine involved in the second purchase turned out to be bad; this was the same incident Alston testified to, and Brown also ceased doing business with Matthews thereafter.

The third conspirator to testify was Antonio Austin. Austin was sentenced to 188 months in prison for his role in the conspiracy. The Government filed a Rule 35 motion that was pending at the time of Matthews's trial; Austin was hopeful that it would result in a reduction of his sentence. At trial, Austin testified to the following facts concerning the conspiracy: Austin sold cocaine in Jacksonville at a rate of about two kilograms per week. His primary suppliers were Farrell Alston and James Brown in Miami. Peewee transported the cocaine from Miami to Jacksonville until he was stopped in August 2000; after that, Austin himself would go to Miami to get the cocaine. Austin met Matthews in late 1999 at Sleep's house and first bought cocaine from him—specifically, 1.5 kilograms for a price of $33,000—in December 2000 in a deal facilitated by James Brown. He also bought one kilogram from Matthews in February 2001 for $22,000. He witnessed Matthews deliver three kilograms of cocaine to Jason Moore on another occasion.

Jason Moore, one of the primary dealers on the Jacksonville end of the conspiracy, was the fourth member of the conspiracy to testify. Prior to his indictment, Moore became concerned that Shawn Richardson, his "lieutenant," might be cooperating with the Government against him. To convince Richardson that cooperating was a bad idea, Moore had two associates—"Mullet" and "Bubba

ay" – "shoot up" Richardson's house. Richardson, his wife, and his daughter were all shot, but all three recovered. Eventually, Moore cooperated with the government and pled guilty to distributing between fifteen and fifty kilograms of cocaine. Because of his substantial criminal history, Moore was sentenced to 324 months in prison. The Government filed a Rule 35 motion that was pending at the time of Matthews's trial; Moore was hopeful that it would result in a reduction of his sentence.

At trial, Moore testified to the following facts concerning the conspiracy: He also purchased cocaine from Alston and Brown and used Peewee as a courier until August 2000. He met Matthews in 1998 or 1999, and sometime in 1999 Matthews offered to supply him with cocaine at a lower price than Alston and Brown. He did, in fact, purchase two kilograms or so of cocaine from Matthews at Matthews's house several times in 1999, 2000, and 2001. On one of these occasions, Anthony Wells and Shawn Richardson were with him in Miami, and he tried to transport the cocaine back to Jacksonville by putting it in the trunk of their rental car without telling them; however, Wells and Richardson discovered the cocaine before leaving Miami and refused to drive it back to Jacksonville, so Moore had to drive it back himself.

After Moore was sentenced and incarcerated in federal prison in Miami, he also received a letter from Matthews. Like the letters Alston received, this letter used a pseudonym, but Matthews stipulated that he wrote it, and Moore knew that it was from Matthews. In the letter, Matthews wrote, "I am not trying to call you a rat[,] . . . [but] those white folks are saying that you and a couple of

your homeboys are going to comeback on my main man." Moore interpreted this to mean that although Matthews did not want to call Moore a "snitch," the Government (the "white folks") had told him that Moore was, in fact, cooperating against him. The letter also stated, "[S]leep got killed because they say he was working too[;] sleep had a fight with a nigger about that and then the next thing he got shot up in a car with this girl." Moore understood this to mean that Sleep had been killed because he was cooperating with the Government; that is, he understood Matthews to be suggesting that "if you snitch, you going to get killed sooner or later." The letter then asked, "[I]f you would have gotten indicted for something on seven one and you know all you do is gamble around there you will be sick and you will won't to know what's up with those lying nigger wooden you?" In other words, Matthews wanted to know why he had been indicted when all he did at Sleep's house (the "seven one") was gamble. Matthews then reminded Moore that he had always treated him well in Miami. He also told Moore that he had a lot of friends in prison with him and that they had "sent word out about" him, which, according to Moore, meant that they were telling Matthews that Moore was cooperating against him. The letter then urged Moore not to cooperate and to "stay strong and read that bible and start praying." In closing, Matthews warned, "[W]hen that day come we will all see who is doing this to that boy because everyone is saying they are not talking or didn't put this kid in this[;] time will tell and I will be right there to see who really is a Judas."

Rodney Cannon was the fifth conspirator to testify. Cannon pled guilty to distributing one kilogram of powder cocaine and 150 to 500 grams of crack cocaine. After

receiving a three-level reduction for acceptance of responsibility and a two-level reduction for his minor role in the offense, Cannon's guideline range was still 120 months (because he was facing a ten-year statutory mandatory minimum) to 135 months in prison. But because the Government then filed a motion on his behalf under 18 U.S.C. § 3553(e), Cannon also received a three-level reduction for substantial assistance, and the court sentenced him to 78 months in 17 prison for his role in the conspiracy.[8]

The Government also filed a Rule 35 motion that was pending at the time of Matthews's trial; Cannon was hopeful that it would result in a further reduction of his sentence.

At trial, Cannon testified to the following facts regarding the conspiracy: Hesold cocaine in Jacksonville at a rate of about four to six kilograms per month. Jason Moore was his primary supplier. Moore is also Cannon's brother. Cannon was aware that Moore got his cocaine from

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[8] Because Cannon's substantial a 8 assistance reduction put him under an otherwise applicable statutory mandatory minimum, the Government had to file its motion under 18 U.S.C. § 3553(e) ("Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.") rather than simply under U.S.S.G. § 5K1.1. The same was true with respect to Shawn Richardson and Anthony Wells. At trial, however, the parties simply referred to the Government's motions as a § 5K1.1 motions.

Miami—at first from Alston and Brown and, later on, from Matthews—and that Moore either brought it up from Miami himself or used a courier such as Peewee. Cannon estimated that he and Moore purchased a total of about fifty kilograms of cocaine from Matthews in 1999, 2000, and 2001, although Cannon did not meet Matthews until March 2000. Cannon's trial testimony seems to describe only two specific transactions involving one to two kilograms of cocaine each. On both occasions, Matthews actually delivered the cocaine to Moore outside of Cannon's presence.

Shawn Richardson batted sixth for the conspirators. Richardson was initially subject to a ten-year mandatory minimum sentence for his role in the conspiracy. The Government then filed a motion on his behalf under 18 U.S.C. § 3553(e), and he received a reduction for substantial assistance. He also received reductions for acceptance of responsibility and his minor role in the offense, and he was sentenced to only 48 months in prison. The Government also filed a Rule 35 motion that was pending at the time of Matthews's trial; Richardson hoped that the motion would lead to an additional sentence reduction.

At trial, Richardson testified to the following facts: He bought cocaine from Jason Moore and Linwood Smith—about four or five ounces a week at a price of $750 to $800 an ounce—and then resold it around Jacksonville. He ceased doing business with Moore, however, after Moore hid two kilograms of cocaine in the trunk of his rental car without his knowledge or permission. On that occasion, Richardson let Moore and Matthews borrow his car. When they brought it back, Moore gave him, Anthony

Wells, and a friend of theirs named "Tiger" some gas money for their drive back to Jacksonville. When the three of them stopped for gas, however, they discovered the cocaine in the trunk. Richardson then called Moore and told him that he was not going to drive the cocaine to Jacksonville, so Moore drove the cocaine to Jacksonville himself. Richardson, Wells, and Tiger then returned to Sleep's house and got a flight to Jacksonville the next day. At Sleep's house, Matthews told Richardson that he had told Moore that "there was too many of [them], there was too many to drive it back there like that there, man"; Richardson understood "it" to be the cocaine in the trunk.

Anthony Wells rounded out the Government's seven-conspirator lineup. Wells initially faced a statutory mandatory minimum of ten years in prison. The Government then filed a motion on his behalf under 18 U.S.C. § 3553(e), and he received a reduction for substantial assistance. He also received reductions for his minor role in the offense and acceptance of responsibility, and the court imposed a sentence of only 72 months in prison. The Government also filed a Rule 35 motion that was pending at the time of Matthews's trial; Wells hoped that it would lead to a further reduction in his sentence.

Wells sold cocaine and marijuana in Jacksonville. His suppliers were Linwood Smith and Jason Moore. Wells generally purchased cocaine from Moore on a consignment basis in ounce quantities at prices ranging from $650 to $850 an ounce. Rodney Cannon had told Wells that Moore, in turn, purchased cocaine from James Brown, Farrell Alston, and Terrance Matthews. Wells himself saw Matthews in Miami on two or three different occasions, although he

never dealt with him directly. At trial, Wells also testified about the incident in Miami involving the two kilograms of cocaine in the trunk of the rental car. His account of the incident was, in general, consistent with Richardson's. He testified that after they returned to Sleep's house Matthews told him and Richardson that he had "told Jason it wouldn't work," the "it" apparently being Wells, Richardson, and Tiger driving the cocaine back to Jacksonville.

After the conspirators finished testifying, the Government called two members of the Miami-Dade Police Department who testified about a 1991 incident involving Terrance Matthews. On December 31, 1991, the first officer received a tip that there was a black male selling drugs out of the back of a Chevrolet parked on a specific street corner in Miami. The officer located the car and three times observed Matthews take a small package out of the trunk, hand it to another individual, and take something in exchange for it. After the third exchange, Matthews and the package's recipient were arrested. The package contained cocaine, and Matthews had about $2000 cash on his person. The arresting officers then searched the Chevrolet's trunk and found 251 grams of cocaine, some marijuana, about $1500, and three guns. The drugs were all packaged for street sale. According to the second officer, Matthews was willing to talk and told them that he had "been in the game a while" but was just a "worker," not a "lieutenant." In other words, he had been involved in street-level drug sales for some time but was still near the bottom of the drug-trade hierarchy. His only job was to resupply street-level sellers.

The officers' testimony was admitted under Federal Rule of Evidence 404(b) as evidence of Matthews's "intent." The jury was given the following instruction (or a substantially similar one) three different times:

> You may consider [the Rule 404(b)] evidence not to prove that the defendant did the acts charged in the indictment, but only to prove the defendant's state of mind, that is, that the defendant acted with the necessary intent or willfulness and not through acts of mistake. Therefore, if you find, first, that the government has proved beyond a reasonable doubt that the defendant did, in fact, commit the acts charged in the indictment, and that the defendant also committed similar acts at other times, then you may consider those other similar acts in deciding whether the defendant committed the acts charged here willfully and intentionally and not through an accident or mistake.

Vol. 13, at 104-05.

During its closing argument, the Government argued that the 1991 incident did, in fact, help to establish Matthews's "intent":

> The intent in 1991 that the defendant had was to distribute cocaine. He had those little baggies of cocaine in the trunk of his car and he was out there distributing it back in 1991.

> And by the time of this charged conspiracy in 1999 through June of 2001, the defendant had that same intent. He had the same intent to distribute cocaine, only now he was a bigger dealer. He's dealing in kilograms of cocaine, not little baggies of cocaine any longer.

Vol. 14, at 22. In his own closing argument, Matthews's counsel responded that the Government had introduced the Rule 404(b) evidence precisely because it recognized the dubious credibility of the witnesses on which its case rested. **Id. at 31-32.** In rebuttal, the Government dismissed defense counsel's suggestion and maintained instead that the evidence was "important" to the issue of "intent":

> [T]he defense wants you to just kind of breeze over this 1991 incident. The 1991 incident is important. And it wasn't because the government was stretching and didn't think they had a strong enough case, that's what the defense would like you to think. That evidence is relevant and it's important for you to consider in determining the defendant's intent to distribute cocaine. The evidence shows the defendant's intent to distribute cocaine. That's why that evidence was introduced and that's why it was before you for your consideration.

Id. at 62-63.

The jury convicted Matthews on all counts—one count of conspiracy to distribute five or more kilograms of

cocaine and two counts of obstruction of justice by intimidation of a witness.

II.

Matthews first argues that the district court erred in admitting two telephone conversations—one between Jason Moore and Farrell Alston, and one between Matthews and Alston—because the recordings were not sealed in compliance with 18 U.S.C. § 2518(8)(a). In relevant part, that subsection provides:

> The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. . . . The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom . . . .

Id. (emphasis added). The relevant order authorizing the interception of wiretap communications, entered on March 16, 2001, provided that it would terminate "upon attainment of the authorized objectives or, in any event, at

the end of thirty . . . days." **Vol. 1, doc. 71, ex. A, p.9.** In its order denying Matthews's motion to suppress the wiretap evidence, the district court concluded that the order actually terminated when interceptions ceased on April 10, 2001, presumably because "authorized objectives" had been achieved at that time. The tapes were sealed two days later. The district court concluded that this two-day delay was "not unwarranted" in light of other business then occupying the court and the time required to package the tapes for sealing. **Vol. 2, doc. 75.**

Three circuits have held that recordings are sealed "[i]mmediately upon the expiration of the period of the order" if they are sealed within one or two days of the expiration. United States v. McGuire, 307 F.3d 1192, 1204 (9th Cir. 2002); United States v. Wilkinson, 53 F.3d 757, 759 (6th Cir. 1995); United States v. Wong, 40 F.3d 1347, 1375 (2d Cir. 1994). We agree with this interpretation. The statute requires the Government to provide a "satisfactory explanation" for failing to seal the recordings "immediately." See United States v. Ojeda-Rios, 495 U.S. 257, 262-65, 110 S. Ct. 1845, 1849-50, 109 L. Ed. 2d 224 (1990). If we interpreted "immediately" to mean anything less than one or two days, we would essentially transform the statute into a requirement that the Government seal the recordings before, rather than "immediately upon," the order's expiration. Indeed, when, as here, an order expires upon the achievement of "authorized objectives" rather than on a fixed date, it is technically impossible to seal the recordings before the expiration of the order; as such, reading "immediately" out of the statute would effectively extend the "satisfactory explanation" to every such case. Thus, we must give the term "immediately" some meaning.

That being the case, we agree with the Second, Sixth, and Ninth Circuits that "within one or two days" is a reasonable, workable interpretation of that term. Accordingly, we conclude that the recordings at issue here were sealed "immediately upon expiration of the period of the order" within the meaning of the statute.[9]

III.

We next address Matthews's arguments that relate to the Alston-Moore conversation specifically. Matthews argues that the conversation is inadmissible hearsay because it was not "during the course and in furtherance of the conspiracy" to distribute cocaine. Fed. R. Evid. 801(d)(2)(E). His theory is that because Moore and Alston discussed an ecstasy sale, the conversation was in furtherance of a different, unrelated conspiracy to distribute ecstasy, of which he was not a member. On the same basis, he claims that the conversation was irrelevant under Federal Rule of Evidence 401. Finally, he argues that

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[9] In its brief, the Government also argues that the tapes were sealed "before expiration of the thirty-day period described in the authorizing order." Although it is not framed as such, this argument necessarily challenges the district court's determination that the order actually terminated on April 10 and its implicit finding that the order's "authorized objectives" had been achieved at that point. We do not address this contention because we conclude that the tapes were sealed "immediately" even if the order terminated on April 10. For the same reason, we also do not address the Government's argument that it provided a "satisfactory explanation" for the delay even assuming that the tapes were not sealed "immediately."

because Moore and Alston discussed "power pellets" (ecstasy) the evidence was unfairly prejudicial and should have been excluded under Rule 403. "We review the admission of [evidence under Rule 801(d)(2)(E)] for abuse of discretion, and the court's factual findings that the requirements of rule 801(d)(2)(E) were met under the clearly erroneous standard." United States v. West, 142 F.3d 1408, 1413 (11th Cir.1998), vacated on other grounds, 526 U.S. 1155, 119 S. Ct. 2042, 144 L. Ed. 2d 211 (1999). We also review the district court's application of Rule 401 and Rule 403 under an abuse of discretion standard. United States v. Tinoco, 304 F.3d 1088, 1121 (11th Cir. 2002).

Near the end of the Moore-Alston conversation, Moore tells Alston that he will call Matthews because he has Matthews's number programmed on his phone. An hour-and-a-half later, Matthews called Alston. Matthews first asked Alston whether Moore had called him, and Alston replied that he had. Matthews then asked Alston whether he had told Moore "a number" and, more specifically, whether he had "put [Moore] on . . . twenty-six street." At trial, Alston testified that this was code and that Matthews was really asking whether he had offered to sell Moore a kilogram of cocaine for $26,000. Alston answered, "hell no I wouldn't give that to him for that." Matthews said, "Good. Just give it to me then." Alston agreed.

Federal Rule of Evidence 801(d)(2)(E) provides that a statement is not hearsay if it "is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." "[W]hen the preliminary facts relevant to Rule 801(d)(2)(E) are

disputed, the offering party must prove them by a preponderance of the evidence." Bourjaily v. United States, 483 U.S. 171, 176, 107 S. Ct. 2775, 2779, 97 L. Ed. 2d 144 (1987). Matthews argues that the Government did not show that the Moore-Alston conversation was in "the course and in furtherance of [a] conspiracy" in which he was involved. We are not convinced, however, that the district court's finding to the contrary was error, much less clearly erroneous. To recap, Moore told Alston that he would call Matthews. When Matthews called Alston shortly thereafter, he asked Alston whether he had talked to Moore, and Alston said that he had. From the recording and the testimony at trial, it seems that Matthews then asked Alston whether he had quoted Moore a price on a kilogram of cocaine. Moore said that he had not. Matthews then asked whether Alston would sell the kilogram to him instead, and Alston appears to have agreed to do so. In light of all this, it was perfectly reasonable for the district court to conclude that Moore's statement to Alston that he would call Matthews related to the cocaine conspiracy. Matthews is correct that Moore and Alston also discussed ecstasy during the call. He is also correct that he was not charged with distributing ecstasy. But we see no reason to think that the Moore-Alston conversation could not have been "during the course and in furtherance of" two different conspiracies. Accordingly, we reject the argument that it was inadmissible hearsay.

For the same reason, we reject Matthews's claim that the evidence is not "relevant." "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence." Fed. R. Evid. 401. Clearly, statements regarding Matthews made "during the course of and in furtherance of the conspiracy" have some tendency to make Matthews's participation in the conspiracy more probable. They tend to show a connection between Alston, Moore, and Matthews, and, therefore, support trial testimony that Alston and Moore were customers of Matthews and that Matthews was an occasional customer of Alston.

Finally, we reject the argument that this evidence should have been excluded as unfairly prejudicial. Under Federal Rule of Evidence 403, "relevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Matthews argues that he was unfairly prejudiced by the mention of ecstasy ("power pellets") in the Moore-Alston conversation. Most of the brief conversation, however, did not involve drugs. Only at the very end of the call did Moore tell Alston that he would be in Miami later that week and would "need power pellets"; Alston responded simply that he would "get that set up for [him] then." Given that several of the conspirators testified to substantial personal use of cocaine, marijuana, and ecstasy, any unfair prejudice resulting from this brief exchange could not possibly have "substantially outweighed" the probative value of the conversation. Therefore, the district court did not abuse its discretion by refusing to exclude the conversation on this ground.

IV.

We next address Matthews's claim that there was insufficient evidence to convict him under 18 U.S.C. § 1512(b)(1), which provides in relevant part that Although

the court initially instructed th 10 e jury that 18 U.S.C. § 1512(b) made it a crime "to use intimidation toward and corruptly persuade with intent to influence, delay and prevent the testimony of a witness," it then further instructed that the defendant could be found guilty "only if [the Government] proved beyond a reasonable doubt . . . that the defendant used or attempted to use intimidation against [Moore and Alston]." The district court never elaborated on the concept of "corrupt persuasion." "[w]hoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, . . . with intent to influence, delay, or prevent the testimony of any person in an official proceeding shall be fined . . . or imprisoned not more than ten years, or both." The indictment charged Matthews with both "intimidation" and "corrupt persuasion"; however, because the jury was instructed as to intimidation only, we will review the sufficiency of the evidence on that theory only. **Vol. 14, at 74-75.**[10]

"We review challenges to the sufficiency of the evidence de novo. In so doing, we view the evidence in the light most favorable to the Government, taking all reasonable inferences and credibility determinations

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[10] Although the court initially instructed the jury that 18 U.S.C. § 1512(b) made it a crime "to use intimidation toward and corruptly persuade with intent to influence, delay and prevent the testimony of a witness." it then further instructed that the defendant could be found guilty "only if [the Government' proved beyond a reasonable doubt...that the defendant used or attempted to use intimation against [Moore and Alston]." The district court never elaborated on the concept of "corrupt persuasion."

reached in the Government's favor." United States v. Maxwell, 386 F.3d 1042, 1050 (11th Cir. 2004) (citation omitted). "The issue whether a communication is a threat is a question of fact to be left to the jury." United States v. Taylor, 972 F.2d 1247, 1252 (11th Cir. 1992). "If a reasonable recipient, familiar with the context of the communication, would interpret it as a threat, the issue should go to the jury." Martin v. United States, 691 F.2d 1235, 1240 (8th Cir. 1982), quoted in Taylor, 972 F.2d at 1251.[11]

While the evidence was not overwhelming, a number of statements in Matthews's correspondence to Alston and Moore convince us that it was more than sufficient for a reasonable jury to conclude that Matthews was attempting to intimidate Alston and Moore in order to prevent or influence their testimony. All five of the letters discuss Sleep's murder, and two specifically say that Sleep was killed because he was cooperating with the Government. All of the letters suggest that Matthews knew that the recipient was cooperating against him. Matthews reminded Alston that one can never predict exact time of his death. He also advised Moore that he had a lot of friends in the prison in which Moore was incarcerated. The jury was, of course, free to infer that Matthews was merely passing along news of Sleep's unfortunate demise, reflecting on the fleeting nature of human existence, and sending greetings to acquaintances on the inside. But they

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[11] Taylor and Martin addressed 18 U.S.C. § 876, which prohibits using the mails to make threatening communications.

certainly were not required to do so. Matthews's sufficiency of the evidence challenge is, therefore, without merit.[12]

V.

Finally, we turn to Matthews's claim that the district court erred by admitting Rule 404(b) testimony regarding his 1991 arrest. Federal Rule of Evidence 404(b) provides in relevant part that

> [e]vidence of other crimes, wrongs, or acts

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[12] Matthews also challenges the two-level upward adjustment to his offense level for obstruction of justice. See U.S.S.G. § 3C1.1. Because the Government need only establish the facts necessary to support a sentencing enhancement by a preponderance of the evidence, and we review the district court's findings on sentencing matters for clear error, e.g., United States v. Askew, 193 F.3d 1181, 1183 (11th Cir. 1999), it is clear this claim can fair no better than his challenge to the conviction under 18 U.S.C. § 1512(b)(1).

> is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

This circuit's test for admissibility of 404(b) evidence was announced in United States v. Beechum,[13] 582 F.2d 898 (5th Cir. 1978) (en banc), and later elaborated upon in United States v. Miller, 959 F.2d 1535 (11th Cir. 1992) (en banc):

> First, the evidence must be relevant to an issue other than the defendant's character; Second, the act must be established by sufficient proof to permit a jury finding that the defendant committed the extrinsic act; Third, the probative value of the evidence must not be substantially outweighed by its undue prejudice, and the evidence must meet the other requirements of Rule 403.

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[13] In Bonner v. Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981.

United States v. Delgado, 56 F.3d 1357, 1365[14] (11th Cir. 1995). The district court's decision to admit or exclude such evidence is reviewed for abuse of discretion. Id. at 1363.

In United States v. Roberts, 619 F.2d 379 (5th Cir. 1980), we applied this framework in the context of a conspiracy charge, stating that "[i]n every conspiracy case, . . . a not guilty plea renders the defendant's intent a material issue. . . . Evidence of such extrinsic evidence as may be probative of a defendant's state of mind is admissible unless [the defendant] 'affirmatively takes[s] the issue of intent out of the case.'" Id. at 383 (last alteration in original) (quoting United States v. Williams, 577 F.2d 188 (2d. Cir. 1978)). Accordingly, Matthews's plea of not guilty, without an accompanying affirmative removal, made his intent a material issue.

The next question is whether the 1991 arrest is relevant to the intent at issue in the current conspiracy charge. In United States v. Butler, 102 F.3d 1191 (11th Cir. 1997), this court held that a three-year-old prior conviction for possession of cocaine for personal use was relevant and admissible for purposes of demonstrating defendant's intent in the charged conspiracy for possession with intent to distribute. Id. at 1195 - 96; see also United States v. Cardenas, 895 F.2d 1338, 1344 (11th Cir. 1990) ("Evidence of prior drug dealings is highly probative of intent to distribute a controlled substance, as well as involvement in

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[14] Because appellant does not challenge the sufficiency of the evidence supporting the extrinsic act, the second prong of the test need not be considered.

a conspiracy." (internal quotation marks omitted) (quoting United States v. Hitsman, 604 F.2d 443, 448 (5th Cir. 1979))). It must follow then that, at least in this circuit, Matthews's 1991 arrest for distribution of cocaine was relevant to the intent at issue in the charged conspiracy to distribute cocaine.

The third prong of the Beechum/Milller test provides that evidence of prior acts is only admissible if its probative value is not substantially outweighed by its prejudicial effect. In this regard, appellant raises several arguments. First, Matthews claims that the prior drug offense is too dissimilar to the charged conspiracy. As noted, circuit precedent regards virtually any prior drug offense as probative of the intent to engage in a drug conspiracy, and we cannot say that the district court abused its discretion in rejecting the contention that the factual dissimilarity here resulted in disproportionate prejudice. Cf. United States v. Delgado, 56 F.3d 1357, 1366 (11th Cir. 1995) (rejecting the argument that the lack of similarity between a large-scale drug conspiracy and a comparatively smaller, one-time drug purchase from an undercover law enforcement officer rendered the evidence substantially more prejudicial than probative).

Matthews also claims that the 1991 arrest was too temporally remote to be probative of intent. In Beechum this court noted that temporal remoteness is an important factor to be considered as it "depreciates the probity of the extrinsic offense." 582 F.2d at 915. This court, however, has refrained from adopting a bright-line rule with respect to temporal proximity because "decisions as to impermissible remoteness are so fact-specific that a generally applicable

litmus test would be of dubious value." United States v. Pollack, 926 F.2d 1044, 1048 (11th Cir. 1991). Accordingly "appellant bears a heavy burden in demonstrating an abuse of the court's 'broad discretion in determining if an extrinsic offense is too remote to be probative.'" Id. at 1047 (quoting United States v. Terebecki, 692 F.2d 1345, 1349 (11th Cir. 1982)); see United States v. Lampley, 68 F.3d 1296, 1300 (11th Cir. 1995) (upholding district court's admission of fifteen-year-old prior acts). The district court here specifically addressed the temporal remoteness concern and found that the eight-year period from the 1991 incident to the beginning of the alleged conspiracy was not too abstracted to be sufficiently probative. **Vol. 11, at 266 - 67**. We cannot say that appellant met the heavy burden of demonstrating abuse of discretion here, and we therefore decline to upset the trial court's considered judgment that the prior offense was proximate enough to be more probative than prejudicial.[15]

Finally, appellant argues that the 1991 incident was overly prejudicial because the Government otherwise presented a strong case on the issue of intent.[16] We do not

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[15] Nor do we find any merit in the claim that Matthews was too young at the time of the 1991 incident for the prior act to be probative of intent. Appellant offers no reason why we should not presume that a twenty-year old can be held accountable for his or her actions.

[16] In Beechum, this court made clear that the stronger the Government's other evidence of intent, the more willing a court should be to exclude extrinsic evidence on intent as overly prejudicial. 582 F.2d at 914 & n.18.

agree that this is so. The jury was entitled to believe as much or as little of the witnesses' testimony as it found credible. Indeed, the jury may have concluded that Matthews engaged in all of the substantive drug offenses about which the witnesses testified without believing that Matthews intended to join a conspiracy. As this court has previously indicated, this precise difficulty of proving intent in conspiracies is what creates the presumption that intent is always at issue:

> Because the prosecution must prove that the defendant knowingly joined a plan to commit a crime, evidence that establishes a defendant's participation in a criminal act, or evidence establishing his association with co-conspirators, may be insufficient to support the inference that the defendant voluntarily joined a conspiracy to commit a crime. . . .
>
> Unequivocal evidence that a defendant committed a substantive offense may justify the inference that he intended to do so, but it does not plainly support the conclusion that he agreed and planned with others to commit the crime. Evidence of a defendant's association and dealings with a group of conspirators, even when he knows they intend to commit a crime, does not alone show that he himself had the requisite intent to join the conspiracy.

Roberts, 619 F.2d at 383 (citations omitted). As such, the district court was well within its discretion in finding that

the Government's need for additional evidence relevant to intent supported its conclusion that the 1991 incident's probative value was not substantially outweighed by undue prejudice.

While this panel may have decided the issue differently, particularly given the lack of similarity and the extended period of time between the offenses, we cannot say that the trial court's decision to admit the evidence constituted such a clear error of judgment as to amount to an abuse of discretion. See United States v. Frazier, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc) ("[W]hen employing an abuse-of-discretion standard, we must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard."). Accordingly the district court committed no reversible error in admitting testimony regarding Matthews's 1991 arrest.

VI.

For the foregoing reasons, Matthews's convictions are
AFFIRMED.

Tjoflat, Circuit Judge, specially concurring:

I concur in the judgment of the panel because I believe it is the correct application of this circuit's precedent. See, e.g., United States v. Machado, 804 F.2d 1537, 1543 (11th Cir. 1986) ("Only a decision by this court sitting en banc or by the United States Supreme Court can overrule a prior panel decision."). I write separately to express my view that the circuit's doctrine with respect to admission of Rule 404(b) evidence in conspiracy cases has evolved into one that undermines Rule 404(b) itself and represents a perversion of the origins of the circuit's doctrine in this context.

The evidence of Matthews's 1991 arrest was admitted for no purpose other than to show propensity to engage in criminal activity: exactly the purpose for which Rule 404(b) prevents evidence to be admitted. Yet, this circuit's doctrine permits such evidence to be admitted as probative of intent. The doctrine presumes that the intent involved in a small-scale drug transaction (not to mention personal drug use, see United States v. Butler, 102 F.3d 1191, 1195 - 96 (11th Cir. 1997)) is somehow probative of one's intention to conspire with others to commit a drug offense. The result is the admission of prior acts, in the name of intent, that would otherwise be inadmissible propensity evidence.[1] Accordingly, if I were writing on

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[1] I concede that the line between evidence admitted to demonstrate intent and evidence admitted to demonstrate propensity is hardly clear. It is difficult to argue that a person had an intention to do something on a particular occasion because he or she demonstrated that intention previously

without implicitly suggesting that the person has a proclivity towards that intent. Indeed, some contend that a distinction is impossible: "[E]vidence of an unconnected prior crime is always evidence of propensity and never evidence of a specific intent to commit the crime charged. Though an inference of general intent from the prior crime to the offense charged can be made, such an inference is based upon propensity . . . ." Abraham P. Ordover, Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a), 38 Emory L.J. 135, 157 (1989). Regardless, the rules distinguish between the two and so must we. In doing so, however, we need to be mindful of the potential for the exception to swallow the rule. See Thompson v. United States, 546 A.2d 414, 420 - 21 (D.C. 1988) ("[T]he intent exception has the capacity to emasculate the other crimes rule. This is so because, in many cases, it is difficult or impossible to differentiate between the intent to do an act and the predisposition to do it. For obvious reasons, therefore, courts must be vigilant to ensure that poisonous predisposition evidence is not brought before the jury in more attractive wrapping and under a more enticing sobriquet. . . . If the prime purpose or effect of the introduction of other crimes evidence is to show that the defendant is a bad man (and, in this case, a drug seller), so infelicitous a project cannot be salvaged by characterizing the venture as being designed to prove his intent to sell drugs rather than his predisposition to do so." (citation omitted)). At the very least, where the evidence sought to be admitted demonstrates nothing more than a criminal intent (or even, more specifically, a prior intention to violate drug laws) it must be excluded as inadmissible propensity evidence. If the inferential chain must run through the defendant's character – and his or her predisposition towards a criminal intent – the evidence is squarely on the propensity side of the elusive line. Where, on the other hand, an inference can be drawn that says nothing about the defendant's character – for example, based on the "improbability of coincidence," see Clifford S. Fishman, Jones on Evidence: Civil and Criminal § 17:48 (7th ed. 1992) – the evidence is more appropriately

a clean slate, I would hold that the evidence of Matthews's 1991 arrest is irrelevant to the intent at issue and therefore could not be admitted as 404(b) evidence probative of intent.

I.

As noted in the court's opinion, the starting point for all Rule 404(b) analysis in this circuit is our opinion in United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc). There we noted:

> What [Rule 404(b)] calls for is essentially a two-step test. First it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of rule 403.

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admissible for non-propensity purposes.

Id. at 911.[2] In elaborating on the test, we explained that "[o]nce it is determined that the extrinsic offense *requires the same intent as the charged offense* and that the jury could find that the defendant committed the extrinsic offense, the evidence satisfies the first step under rule 404(b)." Id. at 913 (emphasis added). With respect to the second step, we noted that "[i]f the defendant's intent is not contested, then the incremental probative value of the extrinsic evidence is inconsequential when compared to its prejudice; therefore, in this circumstance the evidence is uniformly excluded." Id. at 914. We stated, however, that "[w]hether a mere plea of not guilty justifies the Government in introducing extrinsic evidence in its case in chief is an open question in this circuit. . . . We need not now answer it." Id. at 915.

In United States v. Roberts, 619 F.2d 379 (5th Cir. 1980), the court answered that question in the affirmative in the context of conspiracy cases. Focusing heavily on the uniquely difficult task of proving intent in conspiracy cases, the court concluded that "we cannot apply to them the policy suggested in Beechum of uniformly excluding extrinsic offense evidence when the defendant does not actively contest intent." Id. at 383. "In every conspiracy

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[2] Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403.

case, therefore, a not guilty plea renders the defendant's intent a material issue . . . . Evidence of such extrinsic evidence as may be probative of a defendant's state of mind is admissible unless [the defendant] 'affirmatively take[s] the issue of intent out of the case.'" Id. (last alteration in original) (quoting United States v. Williams, 577 F.2d 188 (2d. Cir. 1978)).[3]

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[3] While it may be too late in the day to question the wisdom of the Roberts presumption, I do find the resulting Hobson's choice particularly troublesome: The defendant must either stipulate to the intent to conspire (which, in a conspiracy charge, would virtually guarantee a conviction) or have the court presume that the defendant has testified and specifically challenged his or her intent to conspire, which the prosecution is then free to rebut with extrinsic evidence. Moreover, at least one commentator has pointed out the logical fallacy of creating "material issues" due to the difficulty of proving a particular crime:

> Courts have accepted the premise that intent is difficult to prove in conspiracy cases. After all, some of the actions of the conspirators standing on their own may be lawful. Since it is difficult to prove intent, and since the jury might infer from a defendant's lawful actions that he did not intend any illegal activity, evidence of unconnected, though similar, crimes will be admitted. [In other words]: when the government has a weak case, it is "necessary" to "materialize" a nonmaterial issue and prove it with propensity evidence. Nothing in the conspiracy cases logically makes intent "a fact of consequence" other than the "need" to get a conviction. . . . Ultimately, the question of whether intent is a material issue should be

It is this latter statement that is now reflexively invoked, frequently without reference to context, or any other analysis for that matter, to admit any and all prior acts (involving drugs) in drug conspiracy cases. See, e.g., Butler, 102 F.3d at 1195 - 96 ("Intent is always at issue when a defendant pleads not guilty to a conspiracy charge.... [W]e conclude that the logical extension of our current jurisprudence is to admit evidence of prior personal drug use to prove intent in a subsequent prosecution for distribution of narcotics."); Unites States v. Costa, 947 F.2d 919, 925 (11th Cir. 1991); United States v. Pollock, 926 F.2d 1044, 1049 (11th Cir. 1991) (concluding, after citing the Roberts proposition, that "the precedents in this circuit allowing evidence of prior drug-dealing offenses in drug conspiracy prosecutions are ample"). Yet Roberts's progeny has ultimately lost sight of two important components of the Roberts opinion. First, the Roberts contribution to the Beechum test referred only to the second prong of the analysis: once extrinsic evidence has been deemed relevant to intent, Roberts presumes that, in conspiracy cases, the probative value of the prior act is not substantially outweighed by its prejudicial impact even if the defendant did not actively contest the issue of intent. Roberts did nothing to alter the analysis of whether a prior act is relevant to the issue of intent. See Roberts, 619 F.2d at 382

> in the hands of the defendant.: the nature of the defense should determine whether intent is material.

Ordover, supra note 1, 154 - 55 (footnotes omitted).

(noting that "[i]f 'the extrinsic offense requires the same intent as the charged offense . . .' then 'the extrinsic offense evidence is relevant to an issue other than the defendant's character,' and satisfies the first requisite of Beechum," before discussing the relevance of a not guilty plea to the second prong of the analysis (citations omitted) (quoting Beechum, 582 F.2d at 913 & 911)); Beechum, 582 F.2d at 914 ("The touchstone of the trial judge's analysis in this context should be whether the Government has proved the extrinsic offense sufficiently to allow the jury to determine that the defendant possessed *the same state of mind* at the time he committed the extrinsic offense as he allegedly possessed when he committed the charged offense.") (emphasis added); United States v. Williford, 764 F.2d 1493,1497 (11th Cir. 1985) ("The first requirement [of a Rule 404(b) analysis] is governed by the general relevance provision of Fed. R. Evid. 401 . . . . [I]f the relevant issue is intent, the acts must require similar states of mind."). Thus, it must first be established that the prior act is probative of intent – that the prior act required the same state of mind as the charged offense – before Roberts comes into play. Roberts simply holds that, in a conspiracy case, absent an affirmative step by the defendant to remove intent from the case, intent is an issue that may be proven through extrinsic acts relevant to that intent.

This observation ties into the second overlooked aspect of the Roberts opinion: Roberts deals specifically with *the intent to conspire* to commit an illegal activity. The more capacious standard for admitting 404(b) evidence in conspiracy cases, announced in Roberts, is fundamentally rooted in the special nature of conspiracy cases. "Charges of conspiracy involve considerations not present in other

criminal prosecutions." Roberts, 619 F.2d at 382. As noted in the court's opinion, ante, the Roberts court reasoned:

> Because the prosecution must prove that the defendant knowingly joined a plan to commit a crime, evidence that establishes a defendant's participation in a criminal act, or evidence establishing his association with co-conspirators, may be insufficient to support the inference that the defendant voluntarily joined a conspiracy to commit a crime. . . .
>
> Unequivocal evidence that a defendant committed a substantive offense may justify the inference that he intended to do so, but it does not plainly support the conclusion that he agreed and planned with others to commit the crime. Evidence of a defendant's association and dealings with a group of conspirators, even when he knows they intend to commit a crime, does not alone show that he himself had the requisite intent to join the conspiracy.

Roberts, 619 F.2d at 383 (citations omitted). In other words, the mental states involved in the substantive drug offenses have very little to do with a defendant's mental state regarding an agreement to conspire. And it is this later intent, about which it is difficult to draw inferences from underlying substantive offenses, that the Roberts framework addresses.

Given the relative difficulty of establishing conspiratorial intent, the Roberts court created the presumption that such intent is at issue (regardless of whether the defendant actively contests the issue) and evidence of prior acts probative of that intent may therefore be admitted, unless the defendant affirmatively removes the issue of intent from the case.[4] But if this relaxed standard for admissibility of Rule 404(b) evidence in conspiracy cases is premised on the incongruity between the intent to conspire and the intent to commit the underlying substantive offense, then the probative prior acts must be something more than another substantive offense. If, as Roberts notes, intent to conspire cannot be inferred from proof of the underlying drug offense, it strains credulity to presume that a prior, unrelated drug offense might be at all probative of one's current intent to conspire.

This is not to say that evidence of prior substantive offenses is not admissible in conspiracy cases. Before extrinsic acts are admitted, however, it must first be determined what fact(s) they are introduced to prove and

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[4] Even an explicit stipulation as to intent may not be sufficient to bar admission of extrinsic evidence. See United States v. Williford, 764 F.2d 1493, 1498 (11th Cir. 1985) ("This circuit has refused to adopt a per se rule either for or against admission of evidence when that evidence is relevant to an issue to which the defendant offers to stipulate.").

whether they are relevant to such fact(s).[5] While prior substantive offenses say very little about one's voluntary participation in a conspiracy, they may be relevant to demonstrate that the defendant had the requisite intent to engage in the criminal object of the conspiracy. See, e.g., United States v. Calderon, 127 F.3d 1314, 1330 (11th Cir. 1997) (defense that defendant "was merely present at the scene of the drug activity" puts intent at issue); United States v. Lampley, 68 F.3d 1296, 1299 (11th Cir. 1994) ("The district court, recognizing that [defendant] was presenting a 'mere presence' defense, stated that the evidence . . . 'shows intent.'"); United States v. Dias-Lizaraza, 981 F.2d 1216, 1225 (11th Cir. 1993) ("[Defendant's] 'non-participation' defense focused squarely on intent. The question in this case . . . was *why* [defendant] was at the shopping center during the transaction."); United States v. Dorsey, 819 F.2d 1055, 1060 (11th Cir. 1987) (defendant claimed he "was merely an 'unwitting' observer ... and that he had no intent to become involved in any criminal activity"); United States v. Richardson, 764 F.2d 1514, 1523 (11th Cir. 1985) ("[T]he government had reason at the start of the trial to believe that [defendant] would argue lack of intent because of his reliance on the entrapment defense."). But the intent in these situations is not the difficult-to-prove intent to conspire that prompted the Roberts presumption; it is the intent to engage in a substantive offense. Whether

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[5] The elements of conspiracy include: (1) the existence of an agreement among two or more persons; (2) knowledge of the general purpose of the agreement; and (3) knowing and voluntary participation in the agreement. United States v. Simpson, 228 F.3d 1294, 1298 (11th Cir. 2000).

extrinsic evidence can be admitted as proof of intent to pursue the objective of a conspiracy, or an associated substantive offense, is a question analyzed through the Beechum framework, unaffected by the Roberts presumption. Intent to commit a substantive offense does not become more difficult to prove simply because the crime is associated with a conspiracy to commit it. Accordingly, the prosecution cannot benefit from the relaxed standard of admissibility to provide proof of the defendant's intent to commit a substantive offense.

Rather, in order for the Roberts presumption to come into play, it must first be demonstrated that the extrinsic act is probative of the intent to conspire. In Roberts itself, the court noted: "Proof that Mr. Roberts had intentionally joined in a conspiracy to operate a gambling business four years prior to his present participation in such an operation increases the likelihood that he had conspired with others to establish and operate the gambling business." 619 F.2d at 383 - 84. Thus, the Roberts court admitted prior acts demonstrative of an intent to agree with others to carry out an illegal course of action, even without an affirmative challenge to that intent. See also United States v. Delgado, 56 F.3d 1357, 1365 (11th Cir. 1995) (prior act: conspiracy and attempt to possess with intent to distribute; Pollock, 926 F.2d at 1047 (prior act: conspiracy to import marijuana); United States v. Nahoom, 791 F.2d 841, 843 (11th Cir. 1986) (prior act: participation in unrelated joint money laundering scheme); United States v. Nabors, 707 F.2d 1294, 1300 (11th Cir. 1983) ("[F]our years before the drug smuggling operation charged, [defendant] had been engaged with [co-conspirator] in a series of virtually identical operations."); United States v. Holman, 680 F.2d 1340, 1348 - 50 (11th Cir.

1982) (prior acts: knowledge of and participation with alleged co-conspirators in "nearly identical" smuggling attempts).

The upshot of this framework is that in conspiracy cases extrinsic evidence can be admitted for either of two intent-related purposes. First it can be admitted to show the defendant intended to engage in the underlying offense (e.g., he intended to distribute or possess an illegal drug). On this, Roberts has no bearing. Second, prior acts may also be introduced as evidence of a defendant's intent to conspire to commit an illegal activity. For this purpose, Roberts provides the presumption that intent is a material issue unless the defendant affirmatively removes it from dispute. Yet in these contexts, the extrinsic acts must at least be more relevant to the intent to conspire than the substantive acts of the charged conspiracy, the irrelevancy of which led to the Roberts presumption in the first place.

Our precedent, however, has evolved into a doctrine foreign to the analytical underpinnings of the Roberts opinion, and antithetical to the purposes of Rule 404(b). We have approved of the admission of prior substantive offenses for the purpose of establishing an intention to accomplish the object of the conspiracy simply because the defendant pled not guilty. See, e.g., Costa, 947 F.2d at 925. In United States v. Maxwell, we admitted extrinsic evidence "as relevant to [defendant's] intent to distribute controlled substances," where defendant "placed [intent] at issue by pleading not guilty to the charge against him." 34 F.3d 1006, 1009 (11th Cir. 1994). And in Butler, we admitted evidence of a prior conviction for *possession* of cocaine, "to establish the intent to conspire to distribute narcotics," after

reciting the familiar refrain that "[i]ntent is always at issue when a defendant pleads not guilty to a conspiracy charge." 102 F.3d at 1195. Compare United States v. Zelinka, 862 F.2d 92, 99 (6th Cir. 1988) ("The district court abused its discretion by admitting the evidence in question without requiring the prosecutor to show its relevance and the necessity for its admission. Even if the evidence indicated that [defendant] possessed cocaine for the purpose of distribution . . ., it was not admissible to prove that he had participated in a conspiracy to distribute cocaine . . . ." (citation omitted)). In other words, due to the Roberts doctrine, unless a defendant affirmatively removes intent from issue, all prior drug offenses, whether probative of the intent to conspire or not, are admissible so long as a conspiracy has been charged and Rule 403 balancing is satisfied.

As a result, the Roberts presumption has morphed into a categorical relevancy doctrine that presumes that virtually all prior drug offenses are relevant and almost automatically admissible in all drug conspiracy cases (subject only to Rule 403).[6] This is true regardless of the

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[6] We have sensibly limited admission of prior acts to those that at least arguably deal with the same underlying substantive offense of the conspiracy (e.g., prior drug offenses in drug conspiracy cases). See United States v. Young, 39 F.3d 1561, 1573 (11th Cir. 1994) ("Alcohol is not a controlled substance, and the illegality of its production is distinct in both fact and law from that involved in growing and selling marijuana. Evidence that the [defendants] made alcohol thus was not probative of their intent to engage in a conspiracy to possess and distribute marijuana, and any inference that could be drawn from the

theory of defense or whether the prior offense involved the same state of mind that is at issue (either by default or affirmatively) in the charged conspiracy. This fuzzy math is not only problematic from a theoretical perspective,[7] but it serves to admit propensity evidence in the name of intent.[8] The intent necessary to possess an illegal drug is no more relevant to the intent to either conspire to distribute illegal drugs or to distribute them than any other criminal act. Cf. United States v. Baldarrama, 566 F.2d 560, 568 (5th Cir. 1978) ("However, there is no real danger of impropriety here, since the prior conviction did not involve a

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introduction of this evidence was precisely that which Rule 404(b) was designed to prohibit.").

[7] Relevance is inherently a case-specific determination, see Fed. R. Evid. 401 advisory committee's note ("Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case."), and this court should not be so bold as to announce a one-size-fits-all rule in a context where one size cannot fit all.

[8] As Judge Torreulla has astutely noted, "[a]t times . . . a court circumvents the ban [on the use of propensity evidence] by allowing other crimes into evidence whenever intent or knowledge are arguably at issue, without making explicit the specific logical progression that makes either intent or knowledge more likely in light of the prior crime." United States v. Rubio-Estrada, 857 F.2d 845, 853 (1st Cir. 1988) (Torruella, J., dissenting). This observation rings particularly true with respect to this circuit's conspiracy case law.

conspiracy, and therefore could not properly have been used by the jury to indicate an intent to conspire."). Its only relevance is sheer propensity: the theory being that the defendant acted illegally then, and is likely to be acting illegally now. This is precisely the inference the law does not allow. Cf. People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930) (Cardozo, C.J.) ("If a murderous propensity may be proved against a defendant as one of the tokens of his guilt, a rule of criminal evidence, long believed to be of fundamental importance for the protection of the innocent, must be first declared away.").

Thus, this circuit's doctrine has turned Rule 404(b) on its head, in so far as conspiracy cases are concerned. The second sentence of Rule 404(b)[9] is an exception to the general rule that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). There is nothing in the Rule or in logic that would treat conspiracies differently in this regard. Yet we have bypassed the strictures of Rule 404(b) by presumptively assuming that intent is always an issue in conspiracy cases and that all prior substantively-related acts are relevant to that intent. This is nothing more than propensity by any other name.

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[9] "[Evidence of other crimes, wrongs or acts] may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." Fed. R. Evid. 404(b).

II.

The case at bar squarely demonstrates the problems created by our precedents. The Government rightly states, that "Matthews's not-guilty plea placed directly at issue his intent to join the charged conspiracy to distribute cocaine." It then seeks admission of Matthews's 1991 arrest for trafficking cocaine as evidence of his intent to engage in the alleged conspiracy. Neither Beechum, Roberts, nor a straightforward relevance analysis would permit the evidence to be admitted.

There is no question in this case that if the jury were to believe the alleged co-conspirators' testimony, it must believe that Matthews intended to possess and deliver cocaine. Moreover, Matthews did not put his intent to distribute at issue merely by pleading not guilty. He did not contend that he engaged in the alleged activities but did not know he was distributing cocaine. He did not contend that he was merely present at the alleged transactions. Rather, Matthews claimed that the witnesses were not telling the truth at all. See Brief of Appellant at 19. The open issue, per Roberts, is whether Matthews had the requisite state of mind to be convicted of a conspiracy to possess and deliver cocaine, viz. whether Matthews voluntarily joined an agreement to engage in such activity. On this issue, the 1991 incident sheds no light. To the extent the prior arrest was at all relevant it was to show that Matthews was dealing drugs 1991 and was still dealing drugs in 1999, 2000, and 2001, which somehow makes it more likely that

he was also *conspiring* to deal drugs during that time.[10] In other words, Matthews was bad in 1991 and he's bad now. Propensity does not become intent simply because the Government says as much.

It is clear to me that this evidence should not have been admitted in this case. Yet our precedent makes it impossible for me to so hold. As indicated in Part I, cases such as Costa and Butler have expanded the Roberts doctrine beyond anything that resembles the original framework.[11] In this circuit, in any conspiracy case where

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[10] As noted above, in its closing argument, the Government argued that [t]he intent in 1991 that the defendant had was to distribute cocaine. He had those little baggies of cocaine in the trunk of his car and he was out there distributing it back in 1991. And by the time of this charged conspiracy in 1999 through June of 2001, the defendant had that same intent. He had the same intent to distribute cocaine, only now he was a bigger dealer. He's dealing in kilograms of cocaine, not little baggies of cocaine any longer.
Vol. 14, at 22. Matthews, however, was not being charged with distribution of cocaine, nor was his intent to further the conspiracy by distributing cocaine put at issue by his not guilty plea.

[11] Under the prior panel rule, this panel would be obligated to disregard any panel decision that are expressly or implicitly inconsistent with earlier circuit precedent such as Beechum or Roberts. See Swann v. Southern Health Partners, Inc., 388 F.3d 834, 837 (11th Cir. 2004) ("Under the prior panel rule, we are bound by the holdings of earlier panels unless and until they are clearly overruled en banc or by the Supreme Court."). I do not believe, however, that the post-Roberts case law can be interpreted as overturning

the defendant has pleaded not guilty and has not stipulated to intent, any prior act that has anything to do with the object of the conspiracy is deemed probative of the intent to engage in the conspiracy. In this case, Matthews was charged with conspiracy to distribute five or more kilograms of cocaine. He pled not guilty and did not stipulate to intent. He was previously arrested for a crime involving drugs. In this circuit, the prior incident is unequivocally admissible subject only to Rule 403 balancing. I strongly encourage the court to revisit the doctrine leading to this result.

Roberts, or is irreconcilable with prior 404(b) doctrine. Rather, I simply believe that Roberts's progeny has, over time, come untethered from the reasoning of the Roberts court and has resulted in an unprincipled and unwieldy doctrine that ought to be tamed. Accordingly, I view this panel as bound by Roberts's progeny and implore the circuit to rethink the direction the doctrine has taken.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DECEMBER 6, 2005
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-15528-JJ

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRANCE MATTHEWS,
a.k.a. Jack,
a.k.a. Say Jack,

Defendant-Appellant.

- - - - - - - - - - - - - - - - - - -

On Appeal from the United States District Court for the Middle District of Florida

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ORDER:

The Court hereby vacates its previous ruling on the petition for rehearing dated August 10, 2005.

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 10 2005
THOMAS K. KAHN
CLERK

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FOR THE ELEVENTH CIRCUIT

No. 03-15528-JJ

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRANCE MATTHEWS,
a.k.a. Jack,
a.k.a. Say Jack,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

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BEFORE: Tjoflat and HILLS, Circuit Judges, and GRANADE*, Chief District judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellee is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

* Honorable Callie V. Granade, Chief United States District Judge for the Southern District of Alabama sitting by designation.

[PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
June 8, 2005
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-15528
Non-Argument Calendar

D.C. Docket No. 02-00109-CR-J-20-TEM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRANCE MATTHEWS,
a.k.a. Jack,
a.k.a. Say Jack,

Defendant-Appellant.

Appeal form the United States District Court
for the Middle District of Florida

(June 8, 2005)

Before TJOFLAT and HILL, Circuit Judges, and GRANADE*, Chief District Judge.

TJOFLAT, Circuit Judge:

Following a jury trial in the United States District Court for the Middle District of Florida, Terrance Matthews was convicted of one count of conspiracy to distribute five or more kilograms of cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1) and two counts of obstruction of justice by intimidation of a witness in violation of 18 U.S.C. § 1512(b)(1). The district court sentenced Matthews to 292 months of imprisonment and ten years of supervised release on the conspiracy count and imposed concurrent sentences of ten years of imprisonment and three years of

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* Honorable Callie V. Granade, United States Chief District Judge for the Southern District of Alabama sitting by designation.

supervised release on each of the witness intimidation counts. On appeal, Matthews raises four issues:[12]

- whether wiretap evidence should have been excluded because the recordings were not sealed in compliance with 18 U.S.C. § 2518(8)(a);
- whether evidence of a telephone conversation not involving Matthews should have been excluded because it was hearsay, irrelevant, and unfairly prejudicial;
- whether there is sufficient evidence to sustain the witness intimidation convictions;

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[12] Matthews belatedly sought to challenge the constitutionality of his sentence in light of Blakely v. Washington, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Briefing in this case was completed before Blakely was decided, but a little more than four months before oral argument Matthews sought permission to file a supplemental brief challenging the constitutionality of his guideline sentence in light of Blakely. That motion was denied, as required by circuit precedent. See, e.g., United States v. Curtis, 380 F.3d 1308 (11th Cir. 2004) (holding that we will not permit supplemental briefs raising Blakely claims that were not advanced in defendants' pre-Blakely initial briefs notwithstanding the fact that such claims were squarely foreclosed by circuit precedent prior to Blakely). But see United States v. Levy, 391 F.3d 1327, 1345-1347 & nn.15-17 (11th Cir. 2004) (Tjoflat, J., dissenting from the denial of rehearing en banc) (explaining that "this court is truly a minority of one on this issue" and collecting cases). Because we vacate Matthews's conviction, this issue is moot.

- whether the district court erred by admitting evidence of Matthews's 1991 arrest under Federal Rule of Evidence 404(b); and

Part I recounts the course of the proceedings in the district court. Parts II-V address Matthews's four claims. In Part V, we conclude that the district court committed error in admitting evidence of Matthews's 1991 arrest and that this error cannot be deemed harmless. For this reason, Matthews's convictions must be reversed.

I.

At trial, the Government presented evidence that Matthews was part of a significant, though somewhat informal and irregular, conspiracy to distribute cocaine in Jacksonville and Miami. DEA Agent Frank Orochena testified that the DEA began investigating the conspiracy in July 2000 when Nathaniel King, also known as "Peewee," offered to cooperate with them. Peewee was involved in the conspiracy as a courier. His job was to take cash from Jacksonville to Miami and then return to Jacksonville with cocaine for distribution there. Peewee's employer was Linwood Smith, a major participant in the Jacksonville end of the conspiracy.

In August of 2000, Peewee and an undercover agent bought five kilograms of cocaine in Miami with cash provided by Linwood Smith. On the return trip to Jacksonville, the DEA seized the cocaine in a staged stop. Peewee was allowed to "escape" so that the investigation would not be compromised. The DEA was then able to obtain authorization for wiretaps on Linwood Smith's cell

phone and two cell phones owned by Farrell Alston, a major supplier in Miami. Smith's phone was monitored for sixty days. During this time more than 6300 calls were intercepted, 319 of which were deemed "pertinent," i.e., related to the conspiracy. Matthews was not involved or mentioned in any of the pertinent conversations. Alston's phones were monitored for thirty days, and more than 2400 calls were intercepted, 106 of which were deemed pertinent. One of the intercepted conversations was between Matthews and Alston; Alston testified that he and Matthews were discussing the sale of a kilogram of cocaine during the call. Matthews's name was also mentioned briefly in a conversation between Alston and Jason Moore, another member of the conspiracy.

The DEA intercepted the Moore-Alston conversation at 5:21 P.M. on March 20, 2001. Near the end of the short call Moore told Alston that he would call "saous" because he had "the number programmed." Alston testified that "sa-ous" was one of Matthews's nicknames; thus, Moore was going to call Matthews because he had Matthews's phone number programmed on his phone. Moore also told Alston that he would "be on your end 'bout Thursday, Friday" and would "need power pellets." According to Alston, "power pellets" are ecstasy pills. Alston told Moore that he would "get that set up for [him] then."

An hour-and-a-half later, the Government intercepted the Matthews-Alston call. During their conversation, Matthews asked Alston whether "J" (Jason Moore) had called him. Alston said that he had. Matthews then asked whether Alston had "put [Moore] on . . . twenty-six street." Alston testified that "twenty-six street" was a

code for the price of a kilogram of cocaine; thus, Matthews was really asking whether Alston had quoted Moore a price of $26,000 for a kilogram of cocaine. Alston replied, "[H]ell no I wouldn't give that to him for that." Matthews said, "Good. Just give it to me then." In other words, according to Alston, Matthews wanted Alston to give him the kilogram so that he could then sell it to Jason Moore.[13] At

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[13] The conversation went as follows:

MATTHEWS: "J" call you?

. . . .

ALSTON:	Who this, Jack?
MATTHEWS:	Yeah.
ALSTON:	Yeah he had call me.
MATTHEWS:	Oh, you told 'em something?
ALSTON:	What, a number?
MATTHEWS:	Yeah.
ALSTON:	No, no, he ain't, ah, he ain't, ah he ain't ask me nothing 'bout that.
MATTHEWS:	Ah, when he ask you a number put him on, ah twenty-six street.
	. . . .
ALSTON:	Who gone, who gone, who ah, oh who gone do that?
MATTHEWS:	Ah, you said on twenty-six street.
ALSTON:	Shit, I a hell no wouldn't give that to him for that.
MATTHEWS:	Good. Just give it to me then.
ALSTON:	Alright. I wouldn't give that to him for that somebody down with me, dawg.
MATTHEWS:	So go more than that?
ALSTON:	You goddamn right.
MATTHEWS:	Where he at, twenty what?
ALSTON:	For him?
MATTHEWS:	Seven?
ALSTON:	No less.
MATTHEWS:	Oh okay, yeah, alright then.

trial, Alston could not recall whether he actually sold Matthews this particular kilogram of cocaine.

In July and October 2001, the DEA arrested a number of members of the conspiracy. Among them were Farrell Alston, Anthony Wells, Shawn Richardson, James Brown, Antonio Austin, Jason Moore, and Rodney Cannon, all of whom eventually pled guilty and, pursuant to their plea agreements, cooperated with the Government and testified against Matthews.

Farrell Alston was the first of the conspirators to testify at trial. Alston testified to having sold more than 400 kilograms of cocaine during the course of the conspiracy. As part of Alston's plea agreement, the Government filed a § 5K1.1 motion[14] on his behalf, which led to a five-level

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ALSTON:	Oh where, where you at, L's house?
MATTHEWS:	Yeah, L's house.
ALSTON:	I'm getting off at the one-o-three right now.
MATTHEWS:	Yeah. Come by here.
ALSTON:	Alright.

One of Matthews's nicknames is "Say Jack" or "Jack."

[14] "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." U.S.S.G. § 5K1.1

sentence reduction for substantial assistance.[15] Alston also received a three-level reduction for acceptance of responsibility. As part of the plea, the Government also declined to pursue any sentencing enhancements based on a firearm found on Alston at the time of his arrest. Alston was sentenced to 135 months in prison for his role in the conspiracy. Without the aforementioned reductions, his applicable guideline range was 324 to 405 months—235 to 293 months even taking into account in the reduction for acceptance of responsibility. The Government also filed a Rule 35[16] motion on his behalf that was pending at the time of Matthews's trial; Alston was hopeful that it would result in a further reduction of his sentence.

At trial, Alston testified to the following facts regarding the conspiracy. Alston and James Brown were partners in Miami, and Alston was introduced to Matthews through Brown. Alston was responsible for getting cocaine, and Brown had connections with buyers in Jacksonville,

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[15] Throughout the opinion, we speak of various sentencing reductions, by which we mean reductions from the "base offense level" under the Federal Sentencing Guidelines for the offense to which the defendant pled guilty.

[16] Federal Rule of Criminal Procedure 35(b)(1) provides that "[u]pon the government's motion made within one year of sentencing, the court may reduce a sentence if: (A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and (B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements." All of the testifying co-conspirators faced ten-year statutory mandatory minimums. Rule 35(b)(4), however, provides that "[w]hen acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute."

including Antonio Austin, Jason Moore, and Linwood Smith. At first, Alston and Brown used Peewee as a courier. Peewee would bring cash to Miami, and they would send twenty to forty kilograms of cocaine at a time back to Jacksonville. After Pewee "escaped" from the staged DEA stop, however, the Jacksonville customers began traveling to Miami to purchase the cocaine in person. Alston's main supplier was George Morales, but he also bought cocaine from Matthews a few times when Morales didn't have all that he needed. Specifically, he purchased cocaine from Matthews – usually five to ten kilograms, but once as much as twenty, at a price of $18,000 to $23,000 per kilogram – "no more than about five or ten times" in 1999 and 2000. He also sold Matthews one to three kilograms of cocaine on about five different occasions in 2000. He and Brown ceased doing business with Matthews, however, after he sold them some bad cocaine sometime in 2000.

After Alston was sentenced and incarcerated in federal prison in Miami Matthews sent him four letters. The letters used pseudonyms, but Matthews stipulated that he wrote them, and Alston knew that they were from Matthews. The first letter began, "I been hearing some bad things about you old boy and it's coming from some people that seems to know you well." It continued, "[T]he talk is that you have went bad for those folks and you are lying on anyone to get time cut . . . . [T]here is anuff brothers in there for nothing on the count of another brother telling a lie on them." Matthews also urged Alston not to "be another sucker for those folks." Alston understood this to mean that Matthews knew that he was cooperating with the Government and wanted him to stop. The letter also encouraged Alston "to seek the lord and pray and read that

bible every day and ask him to show you a way to get closer to him so you could be a better man in christ"; Alston testified that he and Matthews had never discussed religion before.

The letter next stated:

> I know you heard about sleep got killed[;] he got shot up in the car one night[;] he died in the hospital a month later[;] thats why I say get your self right with the lord because we don't know when were leaving here but we won't to be right with Jesus.

"Sleep," also known as "Blind," owned a house in Miami where Matthews, Alston, and other members of the conspiracy met to drink, smoke marijuana, shoot dice, and hold dogfights. Alston understood Matthews to be advising him that he should get himself "right" with God because "you don't know when you're going to die." At this point, the Assistant United States Attorney (AUSA) followed up by asking, "And how did you take that? What did you understand that to mean?" Alston explained, "I was taking it, you know, that I'm cooperating with the government so [Matthews] might have been making threatening gestures." At the end of the letter, Matthews urged Alston not to "be a 'Judus.'"

In the second letter, Matthews again wrote that "sleep got shot up about four times" and urged Alston to keep praying and reading the Bible. He also wrote:

> I know you all ready know the talk on the streets is that you are putting [Matthews] in the mix[.] [W]hats up with that man[?] We all know that [Matthews] didn't have anything to do with you'll other than gambleing and fighting dogs man[.] I don't know but that's crazy too how that kid got indicted on that case with you all. Your son[17] say that you aint saying nothing on no one, but why is it so hard for you to help that man get out of this by just telling the truth to his attorney[?]

Alston understood Matthews to be asking him why he would not tell the Government that Matthews was not part of the cocaine conspiracy, since they both knew that to be the "truth." The letter then stated, "[I]f it was any one of us on the one you know it won't be a problem helping you if they put you in something over there that you had no business with." Matthews apparently meant that the people who hung out at Blind's house ("the one") would all be willing to help Alston if he were ever implicated in a crime he "had no business with."

In the third letter, Matthews wrote,

> [Y]ou don't have your self together with God on believing in Jesus Christ his son because if you did you will be trying to do the right

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[17] Alston's "son" was really a friend of Alston's known as "Tit."

> thing and help a brother out . . . [Y]ou say you aint doing nothing to no one[,] but I don't need silence from you[.] I need . . . a true friend to help me out because you know it aint . . . like they are trying to put it. . . . I'm asking you for your consideration because you know the truth.

Alston understood this to be yet another request that he tell the Government that Matthews was not involved in the cocaine conspiracy, i.e., the "truth." At the end of the letter, Matthews added, "P.S. Sleep Died too!" and "Say Ough Love You!" "Say Ough" is one of Matthews's nicknames.

In the fourth letter, Matthews wrote, "I know you heard about old boy[;] that junk was mess up." Alston understood this to be yet another reference to Sleep's murder. He then wrote,

> [T]hese folks is trying to lock say ough up[.] [W]hat's up with you[?] [A]re you doing what they say you are doing[?] . . . [Say ough] say he been trying to get in touch with you but you won't write back or nothing or talk to his lawyer[.] [H]e say the reason he in this mess is calling your phone and the folk think you'll are talking about something[.] [M]an you know that man didn't have anything to do with you all so way you not going to help that man out of these mess[.] [T]hat man sick[;] he don't know what to do[.] [Y]ou say you not telling nothing on him but you still not trying to help him by

> telling the truth[.] [H]ow will you feel if you got pick up for something on seven one[[18]] and you know you don't do nothing but gamble round there but the folks say you do something else and no one on seven one is trying to help you[?] . . . [I]t seems like I'm losing everyone I love from niggers lying on them[;] you know that's way sleep got shot up because a nigger step to him and said he was telling the folks on him and they had a fight and that same night he got shot up on the house . . . .

Alston interpreted this passage as yet another request that he cease cooperating and tell the Government that Matthews had nothing to do with the conspiracy. He understood the final quoted sentence to mean that Sleep had been killed because someone thought that he was cooperating with the Government.

After Alston finished going through all four letters line-by-line, the AUSA asked him what, in general, he understood the letters to be conveying to him. Alston answered, "Like when he found out that I was cooperating, he made me some threatening gestures."

James Brown testified next. Brown testified that he had sold "hundreds" of kilograms of cocaine during the course of the conspiracy. He pled guilty to conspiring to

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[18] Blind/Sleep's house was known as the "seven one" because it was on 71st Street.

distribute between fifteen and fifty kilograms. After the Government filed a § 5K1.1 motion on his behalf, Brown received a sentencing reduction for substantial assistance, and he was sentenced to 168 months in prison. Without the § 5K1.1 motion, he was facing 262 to 327 months based on his substantial criminal history. The Government also filed a Rule 35 motion on his behalf that was pending at the time of Matthews's trial; Brown was hopeful that it would result in a further reduction of his sentence.

Brown's general description of his partnership with Alston was consistent with Alston's testimony. According to Brown, he and Alston purchased ten or more kilograms of cocaine from Matthews "three or four times at the most" in 1998 and 1999. He also bought smaller quantities of cocaine from Matthews on two other occasions. The cocaine involved in the second purchase turned out to be bad; this was the same incident Alston testified to, and Brown also ceased doing business with Matthews thereafter.

The third conspirator to testify was Antonio Austin. Austin was sentenced to 188 months in prison for his role in the conspiracy. The Government filed a Rule 35 motion that was pending at the time of Matthews's trial; Austin was hopeful that it would result in a reduction of his sentence. At trial, Austin testified to the following facts concerning the conspiracy. Austin sold cocaine in Jacksonville at a rate of about two kilograms per week. His primary suppliers were Farrell Alston and James Brown in Miami. Peewee transported the cocaine from Miami to Jacksonville until he was stopped in August 2000; after that, Austin himself would go to Miami to get the cocaine.

Austin met Matthews in late 1999 at Sleep's house and first bought cocaine from him—specifically, 1.5 kilograms for a price of $33,000—in December 2000 in a deal facilitated by James Brown. He also bought one kilogram from Matthews in February 2001 for $22,000. He witnessed Matthews deliver three kilograms of cocaine to Jason Moore on another occasion.

Jason Moore, one of the primary dealers on the Jacksonville end of the conspiracy, was the fourth member of the conspiracy to testify. Prior to his indictment, Moore became concerned that Shawn Richardson, his "lieutenant," might be cooperating with the Government against him. To convince Richardson that cooperating was a bad idea, Moore had two associates—"Mullet" and "Bubba Ray"—"shoot up" Richardson's house. Richardson, his wife, and his daughter were all shot, but all three recovered. Eventually, Moore cooperated with the Government and pled guilty to distributing between fifteen and fifty kilograms of cocaine. Because of his substantial criminal history, Moore was sentenced to 324 months in prison. The Government filed a Rule 35 motion that was pending at the time of Matthews's trial; Moore was hopeful that it would result in a reduction of his sentence.

At trial, Moore testified to the following facts concerning the conspiracy. He also purchased cocaine from Alston and Brown and used Peewee as a courier until August 2000. He met Matthews in 1998 or 1999, and sometime in 1999 Matthews offered to supply him with cocaine at a lower price than Alston and Brown. He did, in fact, purchase two kilograms or so of cocaine from Matthews at Matthews's house several times in 1999, 2000,

and 2001. On one of these occasions, Anthony Wells and Shawn Richardson were with him in Miami, and he tried to transport the cocaine back to Jacksonville by putting it in the trunk of their rental car without telling them; however, Wells and Richardson discovered the cocaine before leaving Miami and refused to drive it back to Jacksonville, so Moore had to drive it back himself.

After Moore was sentenced and incarcerated in federal prison in Miami, he also received a letter from Matthews. Like the letters Alston received, this letter used a pseudonym, but Matthews stipulated that he wrote it, and Moore knew that it was from Matthews. In the letter, Matthews wrote, "I am not trying to call you a rat[,] . . . [but] those white folks are saying that you and a couple of your homeboys are going to comeback on my main man." Moore interpreted this to mean that although Matthews did not want to call Moore a "snitch," the Government (the "white folks") had told him that Moore was, in fact, cooperating against him. The letter also stated, "[S]leep got killed because they say he was working too[;] sleep had a fight with a nigger about that and then the next thing he got shot up in a car with this girl." Moore understood this to mean that Sleep had been killed because he was cooperating with the Government; that is, he understood Matthews to be suggesting that "if you snitch, you going to get killed sooner or later." The letter then asked, "[I]f you would have gotten indicted for something on seven one and you know all you do is gamble around there you will be sick and you will won't to know what's up with those lying nigger wooden you?" In other words, Matthews wanted to know why he had been indicted when all he did at Sleep's house (the "seven one") was gamble. Matthews then

reminded Moore that he had always treated him well in Miami. He also told Moore that he had a lot of friends in prison with him and that they had "sent word out about" him, which, according to Moore, meant that they were telling Matthews that Moore was cooperating against him. The letter then urged Moore not to cooperate and to "stay strong and read that bible and start praying." In closing, Matthews warned, "[W]hen that day come we will all see who is doing this to that boy because everyone is saying they are not talking or didn't put this kid in this[;] time will tell and I will be right there to see who really is a Judas."

Rodney Cannon was the fifth conspirator to testify. Cannon pled guilty to distributing one kilogram of powder cocaine and 150 to 500 grams of crack cocaine. After receiving a three-level reduction for acceptance of responsibility and a two-level reduction for his minor role in the offense, Cannon's guideline range was still 120 months (because he was facing a ten-year statutory mandatory minimum) to 135 months in prison. But because the Government then filed a motion on his behalf under 18 U.S.C. § 3553(e), Cannon also received a three-level reduction for substantial assistance, and the court sentenced him to 78 months in prison for his role in the conspiracy.[19] The Government also filed a Rule 35 motion

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[19] Because Cannon's substantial assistance reduction put him under an otherwise applicable statutory mandatory minimum, the Government had to file its motion under 18 U.S.C. § 3553(e) ("Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an

that was pending at the time of Matthews's trial; Cannon was hopeful that it would result in a further reduction of his sentence.

At trial, Cannon testified to the following facts regarding the conspiracy. He sold cocaine in Jacksonville at a rate of about four to six kilograms per month. Jason Moore was his primary supplier. Moore is also Cannon's brother. Cannon was aware that Moore got his cocaine from Miami—at first from Alston and Brown and, later on, from Matthews—and that Moore either brought it up from Miami himself or used a courier such as Peewee. Cannon estimated that he and Moore purchased a total of about fifty kilograms of cocaine from Matthews in 1999, 2000, and 2001, although Cannon did not meet Matthews until March 2000. Cannon's trial testimony seems to describe only two specific transactions involving one to two kilograms of cocaine each. On both occasions, Matthews actually delivered the cocaine to Moore outside of Cannon's presence.

Shawn Richardson batted sixth for the conspirators. Richardson was initially subject to a ten-year mandatory minimum sentence for his role in the conspiracy. The Government then filed a motion on his behalf under 18 U.S.C. § 3553(e), and he received a reduction for substantial assistance. He also received reductions for acceptance of responsibility and his minor role in the offense, and he was

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offense.") rather than simply under U.S.S.G. § 5K1.1. The same was true with respect to Shawn Richardson and Anthony Wells. At trial, however, the parties simply referred to the Government's motions as a § 5K1.1 motions.

sentenced to only 48 months in prison. The Government also filed a Rule 35 motion that was pending at the time of Matthews's trial; Richardson hoped that the motion would lead to an additional sentence reduction.

At trial, Richardson testified to the following facts. He bought cocaine from Jason Moore and Linwood Smith—about four or five ounces a week at a price of $750 to $800 an ounce—and then resold it around Jacksonville. He ceased doing business with Moore, however, after Moore hid two kilograms of cocaine in the trunk of his rental car without his knowledge or permission. On that occasion, Richardson let Moore and Matthews borrow his car. When they brought it back, Moore gave him, Anthony Wells, and a friend of theirs named "Tiger" some gas money for their drive back to Jacksonville. When the three of them stopped for gas, however, they discovered the cocaine in the trunk. Richardson then called Moore and told him that he was not going to drive the cocaine to Jacksonville, so Moore drove the cocaine to Jacksonville himself. Richardson, Wells, and Tiger then returned to Sleep's house and got a flight to Jacksonville the next day. At Sleep's house, Matthews told Richardson that he had told Moore that "there was too many of [them], there was too many to drive it back there like that there, man"; Richardson understood "it" to be the cocaine in the trunk.

Anthony Wells rounded out the Government's seven-conspirator lineup. Wells initially faced a statutory mandatory minimum of ten years in prison. The Government then filed a motion on his behalf under 18 U.S.C. § 3553(e), and he received a reduction for substantial assistance. He also received reductions for his minor role

in the offense and acceptance of responsibility, and the court imposed a sentence of only 72 months in prison. The Government also filed a Rule 35 motion that was pending at the time of Matthews's trial; Wells hoped that it would lead to a further reduction in his sentence.

Wells sold cocaine and marijuana in Jacksonville. His suppliers were Linwood Smith and Jason Moore. Wells generally purchased cocaine from Moore on a consignment basis in ounce quantities at prices ranging from $650 to $850 an ounce. Rodney Cannon had told Wells that Moore, in turn, purchased cocaine from James Brown, Farrell Alston, and Terrance Matthews. Wells himself saw Matthews in Miami on two or three different occasions, although he never dealt with him directly. At trial, Wells also testified about the incident in Miami involving the two kilograms of cocaine in the trunk of the rental car. His account of the incident was, in general, consistent with Richardson's. He testified that after they returned to Sleep's house Matthews told him and Richardson that he had "told Jason it wouldn't work," the "it" apparently being Wells, Richardson, and Tiger driving the cocaine back to Jacksonville.

After the conspirators finished testifying, the Government called two members of the Miami-Dade Police Department who testified about a 1991 incident involving Terrance Matthews. On December 31, 1991, the first officer received a tip that there was a black male selling drugs out of the back of a Chevrolet parked on a specific street corner in Miami. The officer located the car and three times observed Matthews take a small package out of the trunk, hand it to another individual, and take something in exchange for it. After the third exchange, Matthews and the

package's recipient were arrested. The package contained cocaine, and Matthews had about $2000 cash on his person. The arresting officers then searched the Chevrolet's trunk and found 251 grams of cocaine, some marijuana, about $1500, and three guns. The drugs were all packaged for street sale. According to the second officer, Matthews was willing to talk and told them that he had "been in the game a while" but was just a "worker," not a "lieutenant." In other words, he had been involved in street-level drug sales for some time but was still near the bottom of the drug-trade hierarchy. His only job was to resupply street-level sellers.

The officers' testimony was admitted under Federal Rule of Evidence 404(b) as evidence of Matthews's "intent." The jury was given the following instruction (or a substantially similar one) three different times:

> You may consider [the Rule 404(b)] evidence not to prove that the defendant did the acts charged in the indictment, but only to prove the defendant's state of mind, that is, that the defendant acted with the necessary intent or willfulness and not through acts of mistake. Therefore, if you find, first, that the government has proved beyond a reasonable doubt that the defendant did, in fact, commit the acts charged in the indictment, and that the defendant also committed similar acts at other times, then you may consider those other similar acts in deciding whether the defendant committed the acts charged here

willfully and intentionally and not through an accident or mistake.

During its closing argument, the Government argued that the 1991 incident did, in fact, help to establish Matthews's "intent":

> The intent in 1991 that the defendant had was to distribute cocaine. He had those little baggies of cocaine in the trunk of his car and he was out there distributing it back in 1991. And by the time of this charged conspiracy in 1999 through June of 2001, the defendant had that same intent. He had the same intent to distribute cocaine, only now he was a bigger dealer. He's dealing in kilograms of cocaine, not little baggies of cocaine any longer.

In his own closing argument, Matthews's counsel responded that the Government had introduced the Rule 404(b) evidence precisely because it recognized the dubious credibility of the witnesses on which its case rested. In rebuttal, the Government dismissed defense counsel's suggestion and maintained instead that the evidence was "important" to the issue of "intent":

> [T]he defense wants you to just kind of breeze over this 1991 incident. The 1991 incident is important. And it wasn't because the government was stretching and didn't think they had a strong enough case, that's what the defense would like you to think.

> That evidence is relevant and it's important for you to consider in determining the defendant's intent to distribute cocaine. The evidence shows the defendant's intent to distribute cocaine. That's why that evidence was introduced and that's why it was before you for your consideration.

The jury convicted Matthews on all counts—one count of conspiracy to distribute five or more kilograms of cocaine and two counts of obstruction of justice by intimidation of a witness.

II.

Matthews first argues that the district court erred in admitting two telephone conversations—one between Jason Moore and Farrell Alston, and one between Matthews and Alston—because the recordings were not sealed in compliance with 18 U.S.C. § 2518(8)(a). In relevant part, that subsection provides:

> The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. . . . The presence of the seal provided for by this subsection, or a satisfactory explanation for

> the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom . . . .

Id. (emphasis added). The relevant order authorizing the interception of wiretap communications, entered on March 16, 2001, provided that it would terminate "upon attainment of the authorized objectives or, in any event, at the end of thirty . . . days." In its order denying Matthews's motion to suppress the wiretap evidence, the district court concluded that the order actually terminated when interceptions ceased on April 10, 2001, presumably because "authorized objectives" had been achieved at that time. The tapes were sealed two days later. The district court concluded that this two-day delay was "not unwarranted" in light of other business then occupying the court and the time required to package the tapes for sealing.

Three circuits have held that recordings are sealed "[i]mmediately upon the expiration of the period of the order" if they are sealed within one or two days of the expiration. United States v. McGuire, 307 F.3d 1192, 1204 (9th Cir. 2002); United States v. Wilkinson, 53 F.3d 757, 759 (6th Cir. 1995); United States v. Wong, 40 F.3d 1347, 1375 (2d Cir. 1994). We agree with this interpretation. The statute requires the Government to provide a "satisfactory explanation" for failing to seal the recordings "immediately." See United States v. Ojeda-Rios, 495 U.S. 257, 262-65, 110 S. Ct. 1845, 1849-50, 109 L. Ed. 2d 224 (1990). If we interpreted "immediately" to mean anything less than one or two days, we would essentially transform the statute into a requirement that the Government seal the recordings

before, rather than "immediately upon," the order's expiration. Indeed, when, as here, an order expires upon the achievement of "authorized objectives" rather than on a fixed date, it is technically impossible to seal the recordings before the expiration of the order; as such, reading "immediately" out of the statute would effectively extend the "satisfactory explanation" to every such case. Thus, we must give the term "immediately" some meaning. That being the case, we agree with the Second, Sixth, and Ninth Circuits that "within one or two days" is a reasonable, workable interpretation of that term. Accordingly, we conclude that the recordings at issue here were sealed "immediately upon expiration of the period of the order" within the meaning of the statute.[20]

III.

We next address Matthews's arguments that relate to the Alston-Moore conversation specifically. Matthews argues that the conversation is inadmissible hearsay

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[20] In its brief, the Government also argues that the tapes were sealed "before expiration of the thirty-day period described in the authorizing order." Although it is not framed as such, this argument necessarily challenges the district court's determination that the order actually terminated on April 10 and its implicit finding that the order's "authorized objectives" had been achieved at that point. We do not address this contention because we conclude that the tapes were sealed "immediately" even if the order terminated on April 10. For the same reason, we also do not address the Government's argument that it provided a "satisfactory explanation" for the delay even assuming that the tapes were not sealed "immediately."

because it was not "during the course and in furtherance of the conspiracy" to distribute cocaine. Fed. R. Evid. 801(d)(2)(E). His theory is that because Moore and Alston discussed an ecstasy sale, the conversation was in furtherance of a different, unrelated conspiracy to distribute ecstasy, of which he was not a member. On the same basis, he claims that the conversation was irrelevant under Federal Rule of Evidence 401. Finally, he argues that because Moore and Alston discussed "power pellets" (ecstasy) the evidence was unfairly prejudicial and should have been excluded under Rule 403. "We review the admission of [evidence under Rule 801(d)(2)(E)] for abuse of discretion, and the court's factual findings that the requirements of rule 801(d)(2)(E) were met under the clearly erroneous standard." United States v. West, 142 F.3d 1408, 1413 (11th Cir.1998), vacated on other grounds, 526 U.S. 1155, 119 S. Ct. 2042, 144 L. Ed. 2d 211 (1999). We also review the district court's application of Rule 401 and Rule 403 under an abuse of discretion standard. United States v. Tinoco, 304 F.3d 1088, 1121 (11th Cir. 2002).

Near the end of the Moore-Alston conversation, Moore tells Alston that he will call Matthews because he has Matthews's number programmed on his phone. An hour-and-a-half later, Matthews called Alston. Matthews first asked Alston whether Moore had called him, and Alston replied that he had. Matthews then asked Alston whether he had told Moore "a number" and, more specifically, whether he had "put [Moore] on . . . twenty-six street." At trial, Alston testified that this was code and that Matthews was really asking whether he had offered to sell Moore a kilogram of cocaine for $26,000. Alston answered,

"hell no I wouldn't give that to him for that." Matthews said, "Good. Just give it to me then." Alston agreed.

Federal Rule of Evidence 801(d)(2)(E) provides that a statement is not hearsay if it "is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." "[W]hen the preliminary facts relevant to Rule 801(d)(2)(E) are disputed, the offering party must prove them by a preponderance of the evidence." Bourjaily v. United States, 483 U.S. 171, 176, 107 S. Ct. 2775, 2779, 97 L. Ed. 2d 144 (1987). Matthews argues that the Government did not show that the Moore-Alston conversation was in "the course and in furtherance of [a] conspiracy" in which he was involved. We are not convinced, however, that the district court's finding to the contrary was error, much less clearly erroneous. To recap, Moore told Alston that he would call Matthews. When Matthews called Alston shortly thereafter, he asked Alston whether he had talked to Moore, and Alston said that he had. From the recording and the testimony at trial, it seems that Matthews then asked Alston whether he had quoted Moore a price on a kilogram of cocaine. Moore said that he had not. Matthews then asked whether Alston would sell the kilogram to him instead, and Alston appears to have agreed to do so. In light of all this, it was perfectly reasonable for the district court to conclude that Moore's statement to Alston that he would call Matthews related to the cocaine conspiracy. Matthews is correct that Moore and Alston also discussed ecstasy during the call. He is also correct that he was not charged with distributing ecstasy. But we see no reason to think that the Moore-Alston conversation could not have been "during the course and in furtherance of" two different conspiracies.

Accordingly, we reject the argument that it was inadmissible hearsay.

For the same reason, we reject Matthews's claim that the evidence is not "relevant." "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Clearly, statements regarding Matthews made "during the course of and in furtherance of the conspiracy" have some tendency to make Matthews's participation in the conspiracy more probable. They tend to show a connection between Alston, Moore, and Matthews, and, therefore, support trial testimony that Alston and Moore were customers of Matthews and that Matthews was an occasional customer of Alston.

Finally, we reject the argument that this evidence should have been excluded as unfairly prejudicial. Under Federal Rule of Evidence 403, "relevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Matthews argues that he was unfairly prejudiced by the mention of ecstasy ("power pellets") in the Moore-Alston conversation. Most of the brief conversation, however, did not involve drugs. Only at the very end of the call did Moore tell Alston that he would be in Miami later that week and would "need power pellets"; Alston responded simply that he would "get that set up for [him] then." Given that several of the conspirators testified to substantial personal use of cocaine, marijuana, and ecstasy, any unfair prejudice resulting from this brief exchange could not possibly have "substantially outweighed" the probative value of the conversation.

Therefore, the district court did not abuse its discretion by refusing to exclude the conversation on this ground.

IV.

We next address Matthews's claim that there was insufficient evidence to convict him under 18 U.S.C. § 1512(b)(1), which provides in relevant part that "[w]hoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, . . . with intent to influence, delay, or prevent the testimony of any person in an official proceeding shall be fined . . . or imprisoned not more than ten years, or both."[21] The indictment charged that Matthews with both "intimidation" and "corrupt persuasion"; however, because the jury was instructed as to intimidation only, we will review the sufficiency of the evidence on that theory only.[22]

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[21] Although we reverse all of Matthews's convictions for the reasons stated in Part V, infra, "we must still rule on [his] sufficiency argument because if the . . . evidence presented by the government was insufficient to carry its burden of proof, then . . . retrial would be prohibited by the double jeopardy bar." United States v. Khoury, 901 F.2d 948, 961 (11th Cir. 1990); see also, e.g., United States v. Palzer, 745 F.2d 1350, 1352 n.4 (11th Cir. 1984) ("[The defendant's] argument[] relating to the sufficiency of the evidence . . . would . . . entitle him to a judgment of acquittal . . . if successful. Because retrial would then violate double jeopardy, we are compelled to address [his] claim[]. . . ." (emphasis added)).

[22] Although the court initially instructed the jury that 18 U.S.C. § 1512(b) made it a crime "to use intimidation toward and corruptly persuade with intent to influence, delay and prevent the testimony of a witness," it then further instructed that the defendant could be found guilty "only if [the Government] proved beyond a reasonable

"We review challenges to the sufficiency of the evidence de novo. In so doing, we view the evidence in the light most favorable to the Government, taking all reasonable inferences and credibility determinations reached in the Government's favor." United States v. Maxwell, 386 F.3d 1042, 1050 (11th Cir. 2004) (citation omitted). "The issue whether a communication is a threat is a question of fact to be left to the jury." United States v. Taylor, 972 F.2d 1247, 1252 (11th Cir. 1992). "If a reasonable recipient, familiar with the context of the communication, would interpret it as a threat, the issue should go to the jury." Martin v. United States, 691 F.2d 1235, 1240 (8th Cir. 1982), quoted in Taylor, 972 F.2d at 1251.[23]

While the evidence was not overwhelming, a number of statements in Matthews's correspondence to Alston and Moore convince us that it was more than sufficient for a reasonable jury to conclude that Matthews was attempting to intimidate Alston and Moore in order to prevent or influence their testimony. All five of the letters discuss Sleep's murder, and two specifically say that Sleep was killed because he was cooperating with the Government. All of the letters suggest that Matthews knew that the recipient was cooperating against him. Matthews reminded Alston that one can never predict exact time of his death. He also advised Moore that he had a lot of

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doubt . . . that the defendant used or attempted to use intimidation against [Moore and Alston]." The district court never elaborated on the concept of "corrupt persuasion."

[23] Taylor and Martin addressed 18 U.S.C. §876, which prohibits using the mails to make threatening communications.

friends in the prison in which Moore was incarcerated. The jury was, of course, free to infer that Matthews was merely passing along news of Sleep's unfortunate demise, reflecting on the fleeting nature of human existence, and sending greetings to acquaintances on the inside. But they certainly were not required to do so. Matthews's sufficiency of the evidence challenge is, therefore, without merit.

V.

A.

Finally, we turn to Matthews's claim that the district court erred by admitting Rule 404(b) testimony regarding his 1991 arrest. Federal Rule of Evidence 404(b) provides in relevant part that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

In United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc),[24] we explained that

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[24] In Bonner v. Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the

> [w]hat the rule calls for is essentially a two-step test. First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of Rule 403.

Id. at 911.[25] Under this framework, we evaluate whether evidence of Matthews's 1991 arrest was admissible to prove "intent" in the instant case. The Government's theory is that "Matthews's not-guilty plea placed directly at issue his intent to join the charged conspiracy to distribute cocaine." It explains that "Matthews's defense at trial that he did not participate in the alleged drug dealing focused squarely on intent" because he "did not attempt to deny that he knew and associated with the individuals testifying against him."

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former Fifth Circuit rendered prior to October 1, 1981.

[25] Obviously, extrinsic offense evidence is relevant only if the "offense was in fact committed and the defendant in fact committed it. Therefore, . . . the Government must offer proof demonstrating that the defendant committed the offense. If the proof is insufficient, the judge must exclude the evidence because it is irrelevant." Beechum, 582 F.2d at 912-13. Our more recent cases have addressed this issue as an independent step in their Rule 404(b) analyses; thus, the Beechum analysis now has three parts. See, e.g., United States v. Miller, 959 F.2d 1535, 1538 (11th Cir. 1992) (en banc). Matthews, however, does not contest the admission of the 404(b) evidence on this ground.

The problem with this theory is that is impossible for us to imagine a scenario under which the jury could have found that Matthews committed any of the acts described by his accusers and yet lacked the requisite guilty intent. The Government emphasizes that Matthews was charged with participation in a conspiracy, which can be difficult to prove. That this is often true, however, is no basis for admitting prior drug-related arrests whenever a conspiracy is alleged. "In order to prove a conspiracy to distribute cocaine, the Government must establish beyond a reasonable doubt: 1) the existence of an agreement among two or more persons; 2) that the defendant knew of the general purpose of the agreement; and 3) that the defendant knowingly and voluntarily participated in the agreement."[26]

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[26] The jury in this case was correctly charged on conspiracy as follows:

In order to establish a conspiracy offense, it is not necessary for the government to prove that all of the people who were members had entered into any kind of formal agreement.

. . . .

Distribution is the transfer or attempted transfer of possession from one person to another.

What the evidence in this case must show beyond a reasonable doubt . . . is: First, that two or more persons in some way or manner came to a mutual understanding to try to accomplish a common and unlawful plan [to distribute cocaine]; and, second, that the defendant knowing the unlawful purpose of the plan willfully joined in it.

A person may become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the names and identities of all the other alleged conspirators.

So if a defendant has a general understanding of the unlawful purpose of the plan, including the nature and anticipated weight of the substance involved, and

United States v. Simpson, 228 F.3d 1294, 1298 (11th Cir. 2000). Here, the Government's witnesses testified to Matthews's participation in numerous large cocaine deals in 1999, 2000, and 2001. The quantities involved ranged from a single kilogram to as much as twenty kilograms at prices of $18,000 to $23,000 per kilogram. Such conduct is not open to an innocent explanation; that is, there was no room for Matthews to say, "Well, yes, I did those things, but I did not intend to conspire to distribute cocaine." By the time the Government put on its 404(b) evidence, it should have been clear that the Government's case would rise or fall based on whether the jury believed Matthews had committed the charged acts at all, not on whether he possessed the requisite guilty intent.

The Government argues that it "needed the extrinsic evidence to satisfy its heavy burden" because its case "rested almost exclusively on the testimony of the cooperating defendants whose agreements with the United States and . . . own criminal behavior undercut their

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knowingly and willfully joins in that plan on one occasion, that is sufficient to convict that defendant for the conspiracy even though the defendant did not participate before and even though the defendant only played a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other and may have assembled together and discussed common aims and interests does not standing alone establish proof of a conspiracy.

Also a person who has no knowledge of a conspiracy but who happens to act in a way which advances some purpose of one does not thereby become a conspirator.

credibility—a matter thoroughly explored by Matthews at trial." We do not doubt that the Government thought that it needed the extrinsic offense evidence. But it is clear that they did not need it to prove intent. We cannot see how a juror would have found the witnesses' credible to the extent that they described buying large quantities of cocaine from Matthews on numerous occasions over a period of more than two years and yet doubted that Matthews did, in fact, intend to involve himself in conspiracy to distribute cocaine. The suggestion is preposterous. What the Government really means is that it "needed the extrinsic evidence to satisfy its heavy burden" because it feared that the jurors would not believe its witnesses at all. The Government wanted the jury to infer that Matthews was dealing drugs 1991 and was still dealing drugs in 1999, 2000, and 2001.[27] This is precisely the inference the law

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[27] As noted above, in its closing argument, the Government argued that

> [t]he intent in 1991 that the defendant had was to distribute cocaine. He had those little baggies of cocaine in the trunk of his car and he was out there distributing it back in 1991. And by the time of this charged conspiracy in 1999 through June of 2001, the defendant had that same intent. He had the same intent to distribute cocaine, only now he was a bigger dealer. He's dealing in kilograms of cocaine, not little baggies of cocaine any longer.

The Government's references to "intent" are forced to the point of being ridiculous. If the jury believed that Matthews was, in fact, "dealing in kilograms of cocaine, not little baggies of cocaine any longer"—i.e., that he possessed two to forty pounds of cocaine, which he sold for $20,000 to $400,000—as the Government's witnesses testified, then there was no room for it

does not allow. See, e.g., People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930) (Cardozo, C.J.) ("If a murderous propensity may be proved against a defendant as one of the tokens of his guilt, a rule of criminal evidence, long believed to be of fundamental importance for the protection of the innocent, must be first declared away.")

At oral argument, the Government essentially argued that evidence of prior drug dealing is admissible whenever a defendant pleads not guilty to conspiracy distribute drugs. The position taken seemed to be that the plea itself renders such evidence automatically admissible—subject, perhaps, to exclusion under Rule 403—regardless of the theory of the defense or the other evidence presented by the Government. This cannot be the law, and we take this opportunity to hold emphatically that it is not the law.

The Government's argument relies primarily on some expansive dicta from United States v. Diaz-Lizaraza, 981 F.2d 1216 (11th Cir. 1993). In Diaz-Lazaraza, the defendant (Diaz) and Frank Posada were arrested after Posada took delivery of two kilograms of cocaine from an undercover agent. Diaz drove Posada to the meeting place, but Posada and the agent then drove to the final transaction site in the agent's car, and Diaz drove off alone in the other direction. Diaz was arrested in a nearby convenience store parking lot shortly after Posada was arrested. At trial, the agent testified that he recognized Diaz's voice from an earlier telephone conversation setting up the sale, and the

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to conclude that he lacked the intent to distribute cocaine.

beeper the agent called to set up the meeting was found in the truck Diaz was driving. Diaz, however, claimed that he had simply driven Posada to the meeting place and was not involved in any drug-related activities. Id. at 1219-20 & 1224-25. Under these circumstances, we upheld admission of Diaz's prior arrest for possession of marijuana with the intent to distribute:

> In this case, far from stipulating to the requisite intent, Diaz's "non-participation" defense focused squarely on intent. The question in this case was not whether Diaz was present at the shopping center during the cocaine transaction with Agent Jordan; he clearly was. The question was why Diaz was at the shopping center during the transaction. Was he there in order to observe or supervise the transaction, or merely by coincidence? This is a question of Diaz's intent.
>
> However, even if Diaz's "non-participation" defense had not involved a question of intent, it still would not preclude the admission of evidence of Diaz's 1988 arrest to show criminal intent. A defendant's strategic decision not to focus the defense on the intent issue falls far short of a stipulation that the defendant possessed the requisite intent. Focusing the defense on an issue other than intent does not reduce the prosecution's burden to prove intent beyond a reasonable doubt. Likewise, it should not

> prohibit the prosecution from meeting that burden with otherwise admissible evidence.

Id. at 1225 (citation omitted).

The second quoted paragraph is dicta in the truest sense of the term, as it addresses a hypothetical case that was not before the court. See, e.g., United States v. Eggersdorf, 126 F.3d 1318, 1322 n.4 (11th Cir. 1997) (defining "dicta" as language "not necessary to decide the case before us"). As such, it is not binding. E.g., Dantzler v. IRS, 183 F.3d 1247, 1251-52 (11th Cir. 1999). Nor is it persuasive.[28] To the extent that Diaz-Lizaraza suggests that even when intent is not realistically at issue it is necessary for the defendant to specifically stipulate to intent in order to avoid the introduction of Rule 404(b) evidence, see 981 F.2d at 1224-25, we do not agree. On one hand, if the defendant's intent is legitimately in issue, we doubt that he can avoid Rule 404(b) evidence simply by offering some

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[28] As Judge Carnes has observed,

> Somewhat like statements in a law review article written by a judge, or a judge's comments in a lecture, dicta can be used as a vehicle for offering to the bench and bar that judge's views on an issue, for whatever those views are worth. The persuasiveness of the rationale given can increase the weight accorded those views, but the fact that the views are formed and put forward in a context of a case in which they do not matter will always subtract from the weight given them.

McDonald's Corp. v. Robertson, 147 F.3d 1301, 1315 (11th Cir. 1998) (Carnes, J., specially concurring).

abstract stipulation.[29] See Old Chief v. United States, 519 U.S. 172, 190, 117 S. Ct. 644, 655, 136 L. Ed. 2d 574 (1997). On the other hand, a formal stipulation in this case would have required an awkward and unnecessary jury instruction—for example, "You are instructed that the defendant denies conspiring to distribute cocaine; the parties have stipulated, however, that if the defendant did conspire to distribute cocaine, he did so knowingly and willingly." Such an instruction would almost certainly confuse the jury and prejudice the defendant to at least some extent, and there is simply no need for it in a case such as this where the obvious issue is whether the defendant committed the acts alleged, not whether he had the requisite intent.

The Government also relies heavily on United States v. Delgado, 56 F.3d 1357 (11th Cir. 1995). In Delgado, we stated that

> [a] defendant who enters a not guilty plea makes intent a material issue, imposing a substantial burden on the government to prove intent; the government may meet this burden with qualifying 404(b) evidence absent affirmative steps by the defendant to remove intent as an issue. Hernandez presented a "mere presence" defense, forcing the government to prove his criminal intent so as to negate any innocent explanation for

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[29] This issue is not before us and this statement is not necessary to decide the case.

> his presence. The other crimes evidence went to intent, not character.

Id. at 1365 (citation omitted). Thus, just as in Diaz-Lazaraza, the 404(b) evidence in Delgado was necessary to dispel the defendant's "innocent explanation for his presence." The other cases cited by the Government are similarly inapposite. See, e.g., United States v. Calderon, 127 F.3d 1314, 1330 (11th Cir. 1997) ("The trial judge admitted the evidence for the limited purpose of establishing . . . intent . . . which he found had been put in issue by [the defendant's] not guilty plea and by his defense that he was merely present at the scene of the drug activity in order to give his brother . . . a ride."); United States v. Pollock, 926 F.2d 1044 (11th Cir. 1991) (theory of the defense: defendant did not know there was cocaine in his rented car); United States v. Cardenas, 895 F.2d 1338, 1342-44 & nn.3-4 (11th Cir. 1990) (holding that extrinsic offense evidence was admissible to prove intent where "the prosecutor stated that she anticipated [the defendant] would deny his intent to be involved in the charged offense" and "defense counsel did not even mention that he would refrain from contesting the intent issue");[30] United

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[30] When pressed at oral argument, the Government cited Diaz-Lizaraza and Delgado as the best cases for its position, but Cardenas is probably better. In Cardenas, a Government witness testified that the defendant, Cardenas, had delivered cocaine to him at a Gainesville, Florida, health club on a single occasion. Cardenas denied any involvement in the transaction. Prior to trial, the Government apparently argued that it should be allowed to introduce 404(b) evidence to prove intent because it anticipated that Cardenas would dispute his intent to

States v. Hicks, 798 F.2d 446, 447-48, 450-52 (11th Cir. 1986) ("intent was clearly at issue" where defendant and a former co-defendant were stopped on a boat carrying five pounds of cocaine); United States v. Wyatt, 762 F.2d 908, 909 (11th Cir. 1985) ("Wyatt asserted in defense that he was acting in his capacity as honorary deputy for the county Sheriff's Department. He argues that all of his . . . involvement in the conspiracy [was] directed toward enticing the conspirators to land a plane laden with marijuana at . . . a public airstrip run by Mr. Wyatt. Wyatt contends that, pursuant to a prior agreement with Sheriff Gunnells, if he provided information to the Sheriff's Department leading to the seizure of an airplane containing contraband, the proceeds from the sale of the airplane would be used to buy a helicopter. Wyatt would then be retained to maintain and fly the helicopter for the Sheriff's Department. At trial, Sheriff Gunnells corroborated Wyatt's claim about a prior agreement.").

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distribute cocaine even if the transaction were proved. See Cardenas, 895 F.2d at 1340-43. In response, the "defendant took no affirmative steps to indicate that lack of intent would not be a defense in the case." Id. at 1343. Given that the charged conduct involved only a single delivery, it is possible that it would have been open to an innocent explanation, i.e., the defendant did not realize that the substance he delivered was cocaine. See id. at 1343-44. In such a case, if the defendant does not even suggest that he will "refrain from contesting the intent issue," id. at 1342 n.4, then it is not an abuse of discretion for the district court to admit the evidence. But this is not such a case. Matthews's accusers testified that he sold large quantities of cocaine for hundreds of thousands of dollars over a period of several years. Such conduct simply is not open to any plausible innocent explanation.

"Where intent . . . is a necessary conclusion from the act, and the act charged is not equivocal, proof of other offenses, even though similar in nature, will not be permitted." M.C. Slough & J. William Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325, 328-29 (1956) (citing People v. Lonsdale, 81 N.W. 277 (Mich. 1899)), cited in Fed. R. Evid. 404(b) advisory committee's notes. Put simply, if the conduct charged is not open to a plausible innocent explanation, then extrinsic offense evidence is not admissible to show intent. At a minimum, the Government must be able to give the court a scenario in which the jury might find that the defendant committed some or all of the acts alleged and yet lacked the requisite criminal intent. If it cannot do so, its case must, as it should, rise or fall on the strength of its evidence that the defendant committed the charged acts. In the instant case, there is no way that a jury could have doubted that Terrance Matthews knowingly and willfully entered into a conspiracy to distribute cocaine if it found beyond a reasonable doubt that he did what his alleged co-conspirators said he did. Accordingly, evidence of Matthews's 1991 arrest could have served no purpose other than to prove a criminal propensity, and its admission was an abuse of discretion.[31]

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[31] Our holding can be stated either of two ways. First, given that the charged conduct simply was not open to an innocent explanation, the 404(b) evidence was not plausibly "relevant" to the issue of intent. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. If Matthews committed the acts alleged, then he obviously intended to conspire to conspire distribute cocaine; conversely, if he did

B.

The Government urges that we should nevertheless affirm Matthews's conviction because any error in admitting evidence regarding his 1991 arrest was harmless.

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not commit those acts, it is equally clear that he did not intend to conspire to distribute cocaine. As such, the 404(b) evidence added nothing on the issue of intent—i.e., it does nothing to make it "more probable" that Matthews intended to conspire to distribute cocaine. It may well be that the evidence makes it more likely that Matthews actually did distribute cocaine. But it is relevant in this sense only because it tends to show criminal propensity and to suggest conformity therewith. This is precisely the (arguably relevant) purpose and inference the rule forbids, and it was, therefore, an abuse of discretion for the district court to admit the evidence.

Second, even starting with the abstract proposition that past instances of drug dealing may be relevant to show whether a defendant intended to conspire to distribute drugs on a later occasion, when, as here, the charged conduct is not open to an innocent explanation, the "incremental probity" of the past drug dealing is virtually nil. In Beechum, we emphasized that

> [p]robity in this context is not an absolute; its value must be determined with regard to the extent to which the defendant's unlawful intent is established by other evidence, stipulation, or inference. It is the incremental probity of the evidence that is to be balanced against its potential for undue prejudice.

582 F.2d 898, 914 (footnote omitted). Here, because logic compels that intent be inferred from any or all of the acts alleged, the 404(b) evidence's incremental probity was zero. In contrast, the danger of unfair prejudice was considerable. Accordingly, the evidence's admission was also an abuse of discretion under the Rule 403 stage of the Beechum analysis. See Beechum, 582 F.2d at 911, 914-17; see also United States v. Jackson, 339 F.3d 349, 354-57 (5th Cir. 2003).

See 28 U.S.C. § 2111; Fed. R. Crim. P. 52(a); Fed. R. Evid. 103(a). "[E]videntiary and other nonconstitutional errors do not constitute grounds for reversal unless there is a reasonable likelihood that they affected the defendant's substantial rights; where an error had no substantial influence on the outcome, and sufficient evidence uninfected by error supports the verdict, reversal is not warranted." United States v. Hawkins, 905 F.2d 1489, 1493 (11th Cir. 1990). If, however, we "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." Kotteakos v. United States, 328 U.S. 750, 765, 66 S. Ct. 1239, 1248, 90 L. Ed. 1557 (1946). The question is not "merely whether there was enough to support the result, apart from the phase affected by the error." Id. The question is "whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." Id. The Government bears the burden of persuasion on this issue. See United States v. Olano, 507 U.S. 725, 734, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993).

The error committed here cannot be deemed harmless. There is at least a "reasonable likelihood" that it had an effect on the jury verdict. Consequently, we are "left in grave doubt" as to whether the error influenced the jury, and we certainly "cannot say, with fair assurance," that it did not. As noted above, the Government itself argues that it "needed the extrinsic offense evidence to satisfy its heavy burden" because its case "rested almost exclusively" on the dubious credibility of its witnesses.

As described in Part I, most of the testifying co-conspirators had already received significant sentence reductions for substantial assistance, and all had Rule 35 motions hanging over their testimony. On cross-examination, Matthews's counsel also brought out the fact that all these witnesses had been incarcerated in close proximity to one another for several months at the same small county jail. In his closing argument, he used this fact to argue that surely this was enough time for them to "get 15, 20, 30, 40 minutes' worth of story together" for trial. The Government's suggestion that they had not even discussed their testimony all those months because they had been instructed not to was, he argued, "almost laughable, . . . an insult."

For the Government to prove its case beyond a reasonable doubt, it needed some glue to hold its witnesses' stories together. It had Matthews's phone call to Alston.[32] The two seem to be discussing a drug deal, and Alston testified that they were, in fact, discussing the sale of a kilogram of cocaine—although he could not remember at trial whether that deal ever actually took place. However, this single call and the testimony of Matthews's alleged co-conspirators were essentially all the Government had to

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[32] The Government also introduced the Alston-Moore conversation in which Moore said that he would call Matthews because he had Matthews's number programmed on his phone. This call does show that Moore, Alston, and Matthews knew one another, but Matthews did not contest this much at trial. Consequently, this call did relatively little to support the testimony of the testifying co-conspirators regarding Matthews's involvement in the conspiracy.

rely on. This might have been enough to solidify the Government's case. But we cannot know whether it was enough because the Government itself was concerned that it was not and thus sought to introduce evidence of Matthews's 1991 arrest. Despite the district court's limiting instruction, it seems fairly likely to us that the Government's witnesses seemed credible to the jury only because Matthews had been caught dealing drugs once before. Indeed, despite her strained references to intent, this is essentially the inference the AUSA suggested to the jury when, during her closing argument, she argued,

> The intent in 1991 that the defendant had was to distribute cocaine. He had those little baggies of cocaine in the trunk of his car and he was out there distributing it back in 1991. And by the time of this charged conspiracy in 1999 through June of 2001, the defendant had that same intent. He had the same intent to distribute cocaine, only now he was a bigger dealer. He's dealing in kilograms of cocaine, not little baggies of cocaine any longer.

Considering all the remaining evidence without the taint of the evidence that was erroneously admitted, it is impossible for us to say with any degree of confidence that the error did not substantially influence the jury's decision.

VI.

For the foregoing reasons, Matthews's convictions are

REVERSED.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 20 2004
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-15528-JJ

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRANCE MATTHEWS,
a.k.a. Jack,
a.k.a. Say Jack,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

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ORDER:

Appellant's motion for leave to file a supplemental brief in light of the Supreme Court's decision in *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004) is DENIED. *See U.S. v. Ford*, 270 F.3d 1346, 1347 (11th Cir. 2001); *U.S. v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001); *U.S. v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000).

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APR 01 2005
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-15528-DD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRANCE MATTHEWS,
a.k.a. Jack,
a.k.a. Say Jack,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

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ORDER:

Appellant's renewed motion for leave to file a supplemental brief if GRANTED.

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

[PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JAN 24 2006
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-15528

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRANCE MATTHEWS,
a.k.a. Jack,
a.k.a. Say Jack,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: TJOFLAT and HILL, Circuit Judges, and GRANADE*, Chief District Judge.

PER CURIAM

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

* Honorable Callie V. Granade, Chief United States District Judge for the Southern District of Alabama sitting by designation.